No. 248

Brf. of Sullivan as Amicus Curiae

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 248.

ALBERT H. WAITE, PETITIONER,

vs.

THE CITY OF SANTA CRUZ.

BRIEF OF FRANK J. SULLIVAN, AMICUS CURIÆ.

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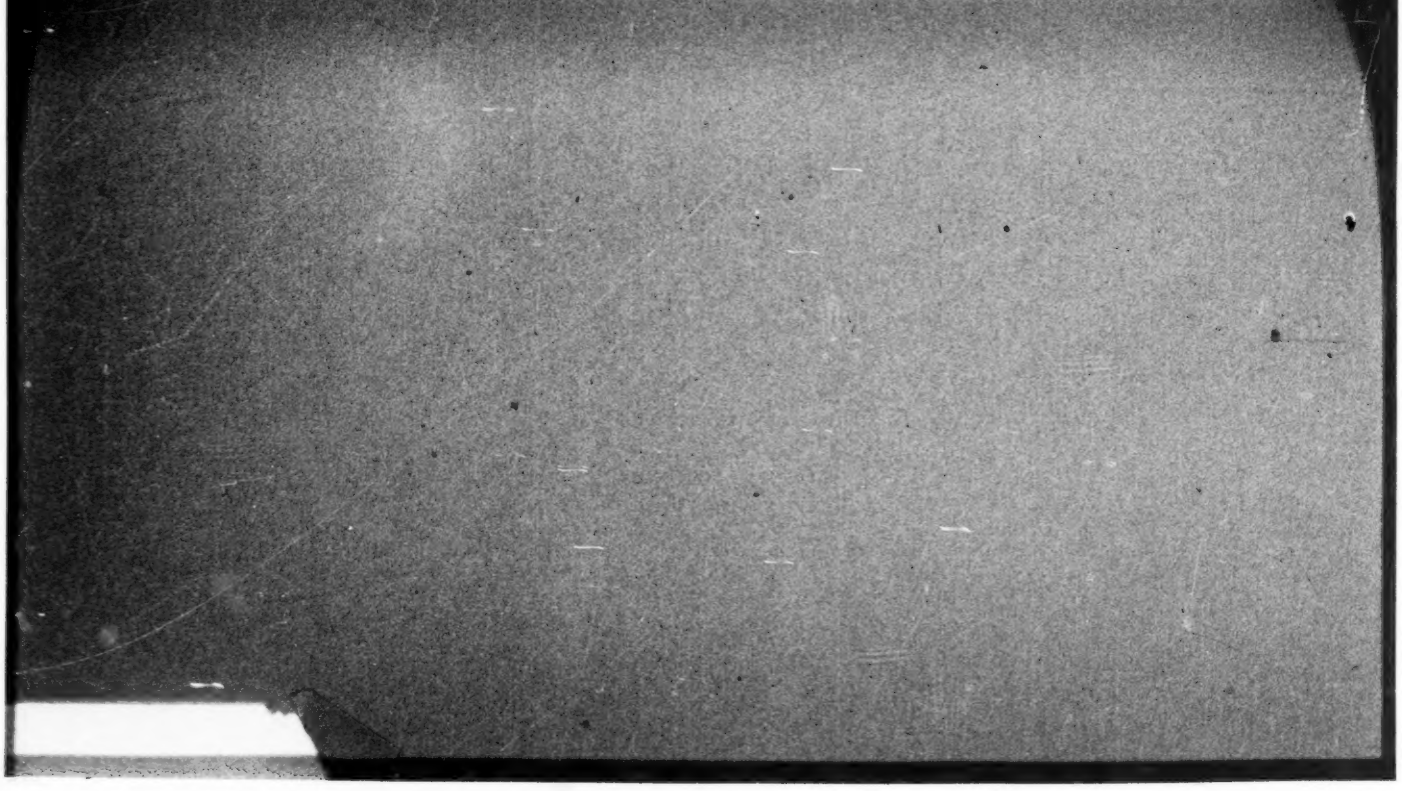

INDEX.

	Page.
Facts	1
1. Contention of Santa Cruz	5
Points of brief	9
1. Act of 1893 unconstitutional	10
2. Is act general authority to issue bonds	33
(*a*) Limited power of act	36
(*b*) Charter of Santa Cruz	42
(*c*) Decisions of California	44
3. All purchasers had notice of the overissue	56
4. The 150 bonds of Wallace & Co. were acquired after knowledge of the illegal character of the issue	70
(*a*) Testimony of Wallace & Co	72
5. The holders of 101 additional bonds had due notice of the defective issue	78

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FACTS.

The facts of the case are clearly stated in the opinion of Justice De Haven, 89 Fed. Rep., pages 620 to 623, as follows:

"This is an action at law to recover the sum of $23,100, claimed to be due on 9 refunding bonds and 282 interest coupons of $50 each, attached to the bonds sued on and other refunding bonds, alleged to have been issued by the defendant on the 16th day of April, 1894, payable on April 15, 1895. The action necessarily involves questions relating to the validity of 360 refunding bonds of $1,000 each, purporting to have been issued by the defendant on the 16th day of April, 1894. The circumstances under which these bonds were issued may be briefly stated as follows: On February 26, 1894, the defendant, City of Santa Cruz, had an outstanding bonded indebtedness of $271,000, or thereabouts,

and was also the owner of certain water works and necessary appurtenances thereto, including land, water rights, etc., theretofore purchased by it from the City Water Company of Santa Cruz, a private corporation. The water works and appurtenant property were subject to a mortgage, which had been placed thereon by the City Water Company of Santa Cruz for the purpose of securing an outstanding bonded indebtedness of that corporation in the sum of $89,000, and interest thereon; and on that day the common council of the defendant city, deeming it to be for the best interest of the defendant to refund its bonded indebtedness under the provisions of an act of the legislature of the State of California entitled 'An act to amend an act entitled "An act to authorize the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same," approved March 15, 1883,' approved March 1, 1893 (St. 1893, p. 59), adopted an ordinance, which was duly approved by the mayor, providing for a special election to be held in the city of Santa Cruz on the 13th day of March, 1894, at which there should be submitted to its qualified electors the question of refunding the outstanding bonded indebtedness of the defendant city. The indebtedness which it was thus proposed to refund was described in the ordinance as consisting not only of certain bonds of the city of Santa Cruz, amounting to the sum of $271,000, but also "eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893) of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the 'City water works of Santa Cruz,' executed by the City Water Company of Santa Cruz, as party of the first part therein, to the Holland Trust Company of New York, as trustee, party of the second part therein; and which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the 'City water works,' and now are, a valid lien and charge upon said property known as the 'City water works,' and became thereby

a part of the bonded indebtedness of the city of Santa Cruz." More than two-thirds of the qualified electors of the defendant voted at the special election thus called in favor of the proposition to refund the then outstanding bonded indebtedness of the defendant as described in the ordinance. Thereafter, on March 26, 1894, the common council of the defendant passed, and its mayor approved, an ordinance for the purpose of carrying into effect the will of the electors of the defendant, as expressed at such special election. This ordinance provided for the issuance of 360 interest-bearing bonds of the defendant of the denomination of $1,000 each, and also directed that such bonds should be signed by the mayor and city clerk, and that each should contain the following recitals:

"'This bond is one of a series of bonds of like date, tenor, and effect issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city, and issuing bonds therefor, and providing for the payment of the same, under and in pursuance of and in conformity with the provisions of an act of the legislature of the State of California, 'An act to amend an act entitled "An act authorizing the common council, board of trustees or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same," approved March 15, 1883,' approved March 1, 1893, and in pursuance of and in conformity with the constitution of the State of California and the ordinance of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz voting at a special election duly and legally called and held and conducted in said city, as provided under said act, on Tuesday, the 13th day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been duly canvassed, found, and declared in the manner required by law; and it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened, and performed in legal and due form, and as required by law.'"

"The ordinance further directed that such bonds should, after public notice inviting bids therefor, be sold to the

highest bidder for not less than their face value in United States gold coin, to be paid on delivery of said bonds at the city treasurer's office in the city of Santa Cruz. The bonds were offered for sale, but there were no bidders for the same, and on April 16, 1894, the date to which the common council of the defendant had regularly adjourned, there were present William T. Jeter, assuming to act as mayor, and J. Howard Bailey, F. J. Hoffmann, E. G. Green, and F. W. Lucas, assuming to act as the common council of the defendant. At this meeting a proposition theretofore made by Coffin & Stanton to take all of said bonds was accepted upon condition that satisfactory security for its faithful performance by Coffin & Stanton should be furnished. This proposition was dated February 27, 1894, and was, in substance, one by which Coffin & Stanton proposed to purchase the refunding bonds at par value, less 3 per cent., without the payment of any money at the time of their delivery, or giving any other consideration therefor than their promise to take up the outstanding bonds which were to be refunded, and to forward the same, 'from time to time, to the city for cancellation.' On April 23, 1894, the said William T. Jeter, assuming to act as mayor, and the said Bailey, Hoffmann, Green, and Lucas, assuming to act as the common council of the defendant, publicly met pursuant to adjournment, and without protest from any one, accepted and approved a bond presented by Coffin & Stanton for the faithful performance by them of the agreement contained in the foregoing proposition, and thereupon directed the city clerk of the city of Santa Cruz to deliver to that firm the entire issue of the refunding bonds referred to. The bonds were, in accordance with this direction, delivered to Walter Stanton, of the firm of Coffin & Stanton, on April 24, 1894, and thereafter Coffin & Stanton sold the same to various parties, from some of whom the plaintiff derived title to the bonds and coupons sued on. The plaintiff is only the nominal owner of said bonds, the same having been assigned to him for the purpose of collection only. Coffin & Stanton never complied in whole or in part with the agreement under which the bonds were delivered to them, and the city of Santa Cruz never received any benefit whatever from their sale, the entire proceeds thereof having been appropriated to their own use by Coffin & Stanton, and that firm is insolvent. The bonds are under the seal of the defendant, contain the recitals above set out,

and are signed: 'Wm. T. Jeter, mayor of the city of Santa Cruz. Attest: O. J. Lincoln, city clerk.'"

The City of Santa Cruz contended and still contends:

(1.) That the court below had no jurisdiction.

(2.) That the act of the legislature under which the bonds were issued was unconstitutional, in this:

a. It was special legislation.

b. It impaired in its working the obligation of contracts.

(3.) That there was a clear overissue of bonds, in this: The admitted assessed value of the city of Santa Cruz was $3,907,400, on which 15 per cent. was the limit allowed by law; yet the two bond issues unpaid showed a total indebtedness of $680,000.

(4.) That the refunding bonds were not legally issued and were not legally sold or delivered, but, on the contrary, were stolen.

(5.) That they were not signed by the regularly qualified mayor of Santa Cruz.

(6.) That the bonds were void because issued for the purpose of refunding the private indebtedness of the Santa Cruz City Water Company (a private corporation), when the statute only permitted a refunding of the city's "indebtedness evidenced by bonds and warrants thereof" (act March 1, 1893, § 1).

(7.) That all the holders of the refunding bonds had notice of these defects and of the invalidity of the election held to refund the same.

(8.) That Wallace & Co., holders of 150 bonds, had notice of all the defects through their agents and attorneys, whose

opinions were had before said bonds were purchased by them.

(9.) That the so-called refunding act of March 1 1893, even if it be held constitutional, did not give gene authority to issue bonds, but only implied authority, if any, to issue special bonds and for the particuiar purpose specified in the notice of election, a public record, of which all purchasers had constructive notice, and which on its face disclosed the invalidity of the bonds.

(10.) That the act of 1893 must be read in connection with the charter of Santa Cruz (Stats. 1875–'76, § 40, p. 203), which prescribes *how* the mayor and council could act, and provides that ordinances shall be kept "separately in large, well-bound, uniform, and suitable books."

In answer to the contentions of the defendant it was and is claimed in behalf of the plaintiff: First. That the persons assuming to act as mayor and common council of the defendant on April 16, 1894, and April 23, 1894, were *de facto* officers of the defendant. Second. That the assignors of plaintiff were *bona fide* purchasers of said bonds without notice, and that the defendant is therefore estopped from disputing the truth of the recitals contained in the bonds.

In the circuit court Justice De Haven held with the city that (89 Fed. Rep., 629)—

"The issuance of bonds for the purpose of refunding the indebtedness of the City Water Company of Santa Cruz, a private corporation, was not authorized by the act under which the bonds in controversy purport to have been issued; and as the bonds issued by the defendant for that purpose were not segregated from others of the same issue the court is not able to determine which particular bonds were to be devoted to the purpose of refunding the indebtedness of the private corporation, and the plaintiff is not entitled to recover in this action (Ætna Life Ins. Co. *vs.* Lyon Co., 44 Fed., 329, and Hedges *vs.* Dixon Co., 150 U. S., 182; 14 Sup.

Ct., 71), unless his contention that he is a *bona fide* purchaser without notice of this infirmity in the bonds, and as such is protected by the recitals contained therein, can be sustained."

However, the court held that the recitals did protect the purchasers, and, further, that the refunding act was constitutional and gave judgment for the bondholders. On appeal to the circuit court of appeals this judgment was reversed on the ground that in the act of 1893 there was no express grant of power on the part of the municipal authorities to issue any bonds. There was an implied power, but the implication was not to issue bonds for any and all purposes, but refunding bonds, with which to take up the outstanding bonds and warrants of the city, provided a majority of the qualified electors of the city should so vote upon the submission of the question to them in the mode described by the act; and for other reasons referred to in the decision of the United States circuit court of appeals.

The evidence adduced on the hearing before the circuit court established the fact that Santa Cruz was a little seaside resort of 6,000 people, and had an assessed valuation of $3,907,404; that it had at the time of the creation of the refunding debt, a debt somewhat as follows:

Improvement bonds, $60,000, less $21,000 redeemed	$39,000
Water bonds, 5 per cent., $300,000, $75,000 redeemed	225,000
Mortgage bonds alleged to be illegal, as they are the bonds of a private corporation	89,000
Say	$353,000

The ordinances 314 and 315 put it at $353,000.

In the Coffin & Stanton circulars in evidence the estimate of original debt is	$360,000
Refunding debt is	320,000
Total	$680,000

In addition to this there are a number of trustee bonds held by the Holland Trust Company of New York amounting to $270,000. The circulars of Coffin & Stanton, which are addressed to all the purchasers of the refunding bonds, refer in terms of eulogy to the charming position of Santa Cruz as a seaside resort.

Beautiful Santa Cruz.

Nature has lavished many of her choicest gifts on this beautiful spot. The experienced eye of the old Franciscan Fathers selected it as the site of one of their missions. Over one hundred years ago they erected an adobe church on the spur of one of the hills that overlook the San Lorenzo river. Its crumbling foundation walls were but lately removed to give place to a gothic edifice erected by an energetic and unselfish priest. About the adobe church the town first grew, until finally, throwing off its swaddling clothes, it vied with the San Lorenzo in its march to the sea. The effect of its picturesque situation is impressive. Before it lies the beautiful Bay of Monterey, and, far across to the south, an old and sleepy Spanish town of the same name. The peaceful waters of the bay, sweeping in a curve toward the mouth of the San Lorenzo, form a hard, sandy beach, unequaled for bathing. Nestling in valleys and crowning hillsides the little city forms a pleasing and undulating landscape, while far in the background appear a range of hills clad with primeval forests. Farther yet, touching the clouds, rises the bold knob of Loma Prieta like a sentinel tower of olden time. Toward the west, in all its grandeur and with its

ever-changing colors, lies the great Pacific ocean. Its climate never knows the intense heat of an eastern summer or the icy chillness of an Arctic winter. A drive on its cliff road is a sight worthy to be remembered. Mountain, hill, valley, bay, and ocean exhibit in turn their striking charms, which touch the heart and kindle in its recesses memories that never die. Yet this is the lovely spot which is now face to face with ruin.

The following propositions are submitted to the court:

I. The act of March 1, 1893, which is known as the refunding act, is unconstitutional.

II. The act of March 1, 1893, did not give general authority to issue bonds, but only implied authority (if any) to issue the special bonds, and for the particular purpose specified in the notice of election—a public record, of which all purchasers had constructive notice, and which on its face disclosed the invalidity of the bonds.

III. All purchasers of the bonds had notice of the overissue.

IV. The 150 bonds held by Wallace & Co. were acquired after knowledge of their illegal character.

V. The holder of 101 additional bonds had also notice of the defective issue.

I.

THE REFUNDING STATUTE UNDER WHICH THE BONDS WERE ISSUED IS UNCONSTITUTIONAL.

The statute is local and special. It authorizes the issuance of refunding bonds by all cities of the State of California except cities of the first class. It violates that section of the constitution which requires that the legislature shall not pass local or special laws in certain enumerated cases, and in all other cases where a general law can be made applicable (Const. Cal., art. 4, sec. 25, sub. 10, 11, 19, 24, 33). It further violates that section of the constitution which provides: "All laws of a general nature shall have "a uniform operation" (sec. 2, art. 1, Const. Cal.).

The supreme court of the State has repeatedly held acts of this kind unconstitutional. It was the design of the framers of the constitution to prevent, on the part of the legislature, a practice, theretofore permissible, of singling out a particular town or city and passing legislation directly affecting it and no other. It was believed that the exercise of this power by the legislature led to abuses, and that a constitutional provision relieving cities from this particular form of legislative control would better subserve the purposes of good government. Therefore, in the case of those municipal corporations known as counties, the constitution permitted a classification by population only for the purpose of fixing the compensation of officers, and insisted that the system of county governments should be uniform throughout the State (art. II, sec. 4), and that the duties of the officers recognized by this system should likewise be prescribed by general and uniform law (art. II, sec. 5).

When it came to treat of the other class of municipal corporations, cities, or cities and counties, and towns, it pro-

vided as follows: "Corporations for municipal purposes "shall not be created by special law; but the legislature, "by general laws, shall provide for the incorporation, organ- "ization, and classification, in proportion to population, of "cities and towns; which laws may be altered, amended, or "repealed. Cities and towns heretofore organized or incor- "porated may become organized under such general laws "whenever a majority of the electors voting at a general "election shall so determine, and shall organize in con- "formity therewith; and cities or towns heretofore or here- "after organized, and all charters thereof framed or adopted "by authority of this constitution, shall be subject to and "controlled by general laws." Still further to emphasize its policy, it set forth, in article 4, sections 25, 32, subjects upon which local legislation or special laws were inhibited, and in subdivision 33, as an "*omnium gatherum*," forbade the legislature from passing such laws "in all other cases where "a general law can be made applicable." These provisions clearly indicate, however, that the constitution does not mean to deprive the legislature of the power to pass laws affecting municipal corporations, but only to insist that such laws as may be passed shall be of general application, to avoid the evil spoken of.

The tendency of judicial opinion is to hold all legislation *special* which applies to a selected or designated class, even though it embraces the whole of the class, unless there appears some reason why its operation should be restricted, and some natural, intrinsic, and constitutional distinction given, and legislation which seeks to arbitrarily grant privileges or immunities, or to increase burdens or impose disabilities upon a particular class, which might for the same reason be made applicable to all others.

Where a statute authorized supervisors in counties of certain classes only to appoint deputies for county clerks, the court held the statute void and said: "'If there is any one feature of the constitution more marked, any characteristic more pervasive than all others, it is this oft-reiterated, this general and specific inhibition of local and special laws.' And yet, if they can be thus easily evaded, how ineffectual and farcical they are.

Legislatures and courts are not at liberty to disregard a policy so plainly manifested in the fundamental law. But while the sovereign will is thus plainly expressed in the fundamental law, the rule must not receive an interpretation too absolute. It will not be presumed that it was intended to deprive the legislature of all power to adapt its laws to the varying conditions of its inhabitants. From necessity it has been held that the legislature may classify in order that it may adapt its legislation to the needs of the people. If this cannot be done laws will not always bear equally upon the people. This classification, however, must be founded upon differences, which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary for the mere purpose of classification that legislation, really local or special, may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation."

Darcy *vs.* Mayor, etc., 104 Cal., 642–645.

A necessity for such classification must exist, "a neces-
"sity springing from manifest peculiarities clearly distin-
"guishing those of one class from each of the other classes,
"and imperatively demanding legislation for each class
"separately that would be useless and detrimental to the
"others."

Id.

Where a statute made a discrimination between cities of the fifth and sixth classes and all other cities in the right of eminent domain, the court said: "The conclusion is, that "although a law is general and constitutional when it "applies equally to all persons embraced in a class founded "upon some natural or intrinsic or constitutional distinc- "tion, it is not general or constitutional if it confers particular "privileges, or imposes peculiar disabilities or burdensome "conditions, in the exercise of a common right upon a class "of persons arbitrarily selected from the general body of "those who stand in precisely the same relation to the sub- "ject of the law."

City of Pasadena *vs.* Stimson, 91 Cal., 238–251.

Where an act discriminated between teachers in large districts and those in small ones, the court, holding it invalid, said: "A special law is one referring to a selected class as "well as to a particular object. This act refers to a se- "lected class, viz., teachers in cities of 100,000 inhabitants."

Earle *vs.* Board of Education, 55 Cal., 489–494.

Where an act provided one rule for school districts having boards of education and a different rule where no such boards existed, the court held it to be local and special, and said: "Of course, as has been frequently decided, the pro- "hibition of special and local laws cannot be evaded by "arbitrary classification. In fact, a special law—special as "opposed to general laws on the one hand and private acts "on the other—classifies the subjects of the law for the pur- "pose of the special provisions. This classification is the "very thing prohibited by the constitution."

Bruch *vs.* Colombet, 104 Cal., 347–351.

Where a statute provided that policemen of certain cities having 10,000 but not more than 25,000 inhabitants should receive salaries different from those of other cities, the court

in holding the statute unconstitutional said: "The law in "question here, if the class specified would include San Jose "alone, is a law limiting the discretion of the council of "San Jose in regard to the compensation of policemen. "There is nothing in the fact that the population is between "10,000 and 25,000 which suggests a possible reason for ex- "cepting such municipality from the general rule. No "rational ground for the distinction appears. The classifica- "tion is, therefore, arbitrary and unauthorized."

Darcy *vs.* Mayor San Jose, 104 Cal., 642–648.

Where the insolvent act of 1880 permitted appeals to the supreme court from an order adjudging a party guilty of contempt in conflict with section 1222, C. C. P. (the general law), where no such appeals are permitted, the court held the act special legislation.

Ex parte Clancy, 90 Cal., 553.

An act concerning license taxes of cities or towns under ordinances of the board of supervisors of certain counties was held special legislation, as it applied to a single class of counties.

San Luis Obispo *vs.* Graves, 84 Cal., 71.

Where an act provided for the assessment of railroad property only, and the form of complaint in actions for collections thereof, the court held it to be special and discriminating legislation, and said: "A clause or provision "special in its character applying to particular individuals, "particular places or particular cases, is none the less special "because inserted in the most general of public acts. While "it is true, with some exceptions, that a law which applies "to all of a class in a State is held to be a general law, it is "equally true that one which applies only to a part of a "class is special and void as being within the constitutional

"inhibition. Legislation which relates not to any genus, "but only to species is special legislation."

People *vs.* C. P. R. R. Co., 83 Cal., 394, *syllabus.*

An act reducing salaries and purporting to affect only three of the forty-eight classes of counties of the thirty-fifth class into which the counties of the State had been classified was held to be eccentric, exceptional, and caused abuse of discrimination between officers upon which it operates, and therefore unconstitutional.

Miller *vs.* Kister, 68 Cal., 142.

An ordinance of San Francisco granting a privilege to a street railroad to use the tracks of another for more than five blocks was held in violation of the act of March, 1870, p. 481, providing for the use of five blocks only, and therefore special legislation.

Omnibus R. R. Co. *vs.* Baldwin, 57 Cal., 160.

An act providing a charter for cities of certain number of inhabitants that could not apply anywhere but in San Francisco was held unconstitutional upon many grounds, but also as special legislation.

Desmond *vs.* Dunn, 55 Cal., 242.

An act making it a misdemeanor to bake bread for sale between certain hours on Saturday and Sunday was held to be a special law and unconstitutional, because it discriminated against a certain class of working people.

Ex parte Westerfield, 55 Cal., 550.

A statute which made it a misdemeanor to conduct a barber shop on Sunday was held to be special legislation because based upon an arbitrary classification, and after citing with approval Pasadena *vs.* Stimson, 91 Cal., 238, and Darcy *vs.* Mayor of San Jose, 104 Cal., 642, the court said:

"In the case of our cities, the constitution itself decrees "classification by population, and the differing exigencies of "municipal government require that laws operating upon "any class should be held general. Otherwise the constitu- "tional scheme itself is overthrown. But in a law such as "this no reason has been or can be shown why the followers "of one useful and unobjectionable employment should be "debarred from the right to labor upon certain days and "others in like classes of employment be not so debarred."

Ex parte Jentzsch, 112 Cal., 468–474.

Where counties of the eighth class of the county government act were segregated from all others of the same class, and authority conferred upon the district attorney therein different from that officer in other counties, the court held the act to that extent local and special. The act of the legislature applied to one county and did not cease to be local because it purported to be applicable to a class of counties which the legislature was not authorized to create for the purpose of such legislation, and of which that county constituted the only member.

Welsh *vs.* Bramlet, 98 Cal., 219.

An act authorizing the district attorney of counties of the eighth class to appoint assistants to be paid by the county was held to be local and special legislation and in conflict with section 5 of article II, providing for general and uniform laws for the election or appointment, duties, and terms of officials.

Walser *vs.* Austin, 104 Cal., 128.

An act giving discretion to the judge of a court in counties of a specified class and making the allowance depend on the absolute will of the judge is a violation of section 25 of article IV of the constitution, forbidding special legislation regulating county business, and the same act providing that in

one class only a witness in a criminal case shall be allowed the same *per diem* and mileage as jurors, subject to the discretion of the judge, is unconstitutional and void as special legislation, and has not a uniform operation, as required by section 2 of article I, which provides that all laws of a general nature shall have a uniform operation.

Turner *vs.* Siskiyou Co., 109 Cal., 332.

An act adding a new article to the Political Code and providing for boards of election commissioners in cities, and cities and counties having 150,000 or more inhabitants, was held to be an improper attempt to create a class of municipal corporations for a special purpose without reference to the existing classification by general law, and also to be local and special legislation in conflict with section 25 of article IV of the constitution.

Denman *vs.* Broderick, 111 Cal., 96–103.

In that case it was said with approval: "In Desmond *vs.* "Dunn the court held that 'sections 6 and 7 of article VI "'of the constitution evidently contemplated the enactment "'of general laws providing for all corporations for municipal "'purposes and not for some only; and such laws must be "'as general as the subject to which they relate."

The primary election law of March 27, 1895, being expressly confined in its operation and effect to counties of the first and second class, was held to be local, special, and unconstitutional for the reason that such a law was upon a subject-matter to which a general law having a uniform operation throughout the State could be made applicable.

Marsh *vs.* Supervisors of Los Angeles, 111 Cal., 368.

An act permitting the voting of straight tickets by stamping the ticket opposite the names of certain parties at the head of the ticket was held unconstitutional, as not providing for a uniform operation of the law.

Eaton *vs.* Brown, 96 Cal., 371.

A section of an act providing that in counties of the thirty-third class certain extra fees shall be collected from the estates of deceased persons in addition to the prescribed fees was held to be unconstitutional and void because in violation of section 4 of article XI of the State constitution, which commands the legislature to establish a uniform system of county governments, and also of section 11 of article I, which requires that all laws of a general nature shall have a uniform operation, and also of section 33 of article IV forbidding local or special laws in all other cases where a general law can be made applicable. It was there said that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural, or intrinsic, or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stood in the same relation to the subject of the law.

Bloss *vs.* Lewis, 109 Cal., 493.

In the last and leading case just decided, where an act provided for the regulation of fees in cities and cities and counties with a population of over 100,000 inhabitants and prescribed the duties of the officers in reference thereto, it was held that such an act was unconstitutional and invalid, as it was based upon an arbitrary distinction, there being no reason why attempted protection shall be accorded to a city of 100,000 inhabitants and not to one of less population, and also as special legislation in a case where a general law can be made applicable. The object of classifying municipal corporations according to population and forbidding their creation by special laws was to avoid the necessity of special legislation. The legislature cannot pass laws touching the organization and in-

corporation of municipalities except by conforming to the requirements of the classification; but upon other matters it may pass general and uniform laws applicable either to municipal corporations of a given class or to all of a separate class created by and designated in the act itself, provided some plain reason appears for the limitation to a class where the law does not apply to all municipalities within the same category. A law is not necessarily a general law merely because it operates upon all municipalities within a specified class, and it is special if it applies merely to all within a class without reason appearing why it is not made to apply generally to all municipal corporations. It was there said: "There is, therefore, nothing in the law "itself, no inherent reason shown why it should be made "applicable to one class and not to all. * * * There is, "then, no natural, or intrinsic, or constitutional distinction "warranting the act in question while there are express "constitutional inhibitions against it."

Rauer *vs.* Williams, 118 Cal., 401.

The court also said: "But while it is thus seen that all "municipalities within the State are subject to the operation and control of general laws under the classification "act of 1883, provided those laws affect their incorporation "and organization, and while it is further seen that a law "touching upon matters of incorporation and organization "will not be held to be a special law because it operates only "upon one or several of the classes, it does not follow that "there may not be legislation not affecting incorporation or "organization which will be general without reference to the "classification act of 1883. To hold otherwise would de"prive of all efficacy and utility the last clause of section 6, "article XI, of the constitution, which declares that 'cities "'and towns heretofore or hereafter organized shall be "'subject to and controlled by general laws.'" To illustrate: The legislature might desire to allow all seaboard cities to

provide for their sewers in the ocean. Such outlets, unless permitted or sanctioned by the legislature, might be held purprestures. It would be meaningless for the legislature to declare that all cities of the first class, or of the second class, or of the third class, might provide such outlets, for of the municipalities in the enumerated classes many might be inland cities. A law providing that all seaboard towns and cities might provide such outlets for their sewers would neither conform to the classification of the act of 1883, nor would it apply to all municipalities within the State; but it would still apply to all within the class thus created by the act itself—that is to say, to all similarly situated—and would be a general law contemplated and permitted by the portion of section 6 of article II of the constitution just quoted. Or, again, instancing a narrower case: A law of the legislature affecting all cities within the State which are ports or subports of entry, and providing a State quarantine system therefor, would not conform to the classification act, and such a law would not apply, because it would be needless to make it apply to all seaboard cities, but it would apply to all cities within the designated class, and such an act likewise would unhesitatingly be upheld as within the scope of section 6 of article II. It may be concluded, therefore, that while the legislature cannot pass laws touching the organization and incorporation of municipalities except by conforming to the requirements of the classification act, upon matters not affecting the incorporation or organization (as in the instances above cited) it may pass laws which will be general if they operate uniformly and generally upon all cities of the class created by and designated in the act itself.

This, the latest decision on the subject, gives the true test of a special law, which is that when it is so made to apply to a class and not to all within the same general category and law, reason must appear for the limitation. It by no means follows that a law is a general law because it operates upon all within a class. It is still special if it applies to all

within a class without reason appearing why it is not made to apply generally to all. The rule is that all laws of a general nature shall have a uniform operation. Where is, then, the reason for a refunding bill which excludes cities of the first class? Is not refunding as essential to them as it is to smaller communities? Why make a distinction? Where is the natural intrinsic or constitutional difference between one city and another so far as the refunding of debts is concerned? It is urged in reply to the authorities cited that the legislature is the sole judge of the reason why the refunding act does not apply to counties of the first class. The constitutional convention inserted the many inhibitions against special laws to prevent such legislation as the very act now under discussion. Not only, therefore, does our supreme court differ from counsel in this respect, but the convention, in adopting the provision of the constitution against special legislation, considered this question and decided adversely to plaintiff's contention.

Constitutional Convention.

The reports of the constitutional convention show that at the time this section in reference to special legislation was under consideration Delegate McFarland, now one of the justices of the supreme court of California, moved to strike out the thirty-third subdivision of section 25, article 4, and said in support of his motion: "Whenever a law is passed "by the legislature somebody will take it to the supreme "court to see whether it is special or general. It is entirely "unnecessary and mischievous. We don't want to provide "for any more constitutional law questions than are abso-"lutely necessary. The courts will have enough to do, any-"way."

Delegate VAN DYKE: I agree with the gentleman that this is a vicious amendment, and I can see no good purpose

that it can subserve; it will always raise the question in court whether a law could not have been made general.

Mr. LARKIN: It is rather remarkable that these two distinguished lawyers should raise an objection to this section. It would tend to encourage their business. That section is the most important section of the whole provision; it is a true principle of government, and whenever a general law can be made applicable a special law should not be passed.

And the convention concurred in the view of Mr. Larkin and refused to strike out the thirty-third subdivision.

Subsequently the same motion was renewed, and after debate on the same line the convention again refused to strike out the subdivision. This shows clearly that it was the sense of the convention, not only that it should remain in the constitution, but that it should mean what it says, and that the courts, in the cases presented to them, should determine the question whether a general law could be made applicable in all the counties as well as in one or more.

Los Angeles *vs.* Teed, 112 Cal., 319, cited by appellant, is not in point for the reason that it decided that the statute or ordinance providing that municipal bonds for the funding of city indebtedness made payable outside of the State at a bank in New York city, or at any other place than the city treasury, contravenes sections 15 and 16 of article II of the constitution and is invalid. It is true the reading of the opinion on other points is quite instructive, but its conclusions are simply *obiter dicta*. Its reasoning in reference to the distinction between large and small cities in reference to refunding is directly opposed to the decisions in the State of New Jersey, which will be cited, and to the case of Rauer *vs.* Williams, *supra*. There is nothing in People *vs.* Henshaw, 76 Cal., 436, and Cody *vs.* Murphy, 89 Cal., 522, to affect the position of defendant. These cases are clearly distinguished in the concurring opinion of Beatty, Ch. J., in Dougherty *vs.* Austin, 94 Cal., 621, as those decisions are sustained by section 6 of article 11 of the constitution, which

permits a classification of cities in proportion to population for the purpose of regulating fees of officers. These are the two principal cases upon which defendant relies. It will serve no useful purpose to point out where the other decisions are inapplicable. In Johnson *vs.* Milwaukee, 60 N. W. Rep., 270, which is said by plaintiff's counsel to be on all fours with the case at bar, the act of the legislature permitted cities with a population of 3,000 inhabitants to issue bonds for parks, etc. It was there said that a law relating to particular persons and things of a class is special; to particular persons or things as a class is general. The certain rules by which the propriety of the classification may be tested have been stated. The main difficulty is in the application. One rule is that classification must be based upon substantial distinctions which make one class really different from another; for example, small cities do not require parks and roads the same as large ones, as the people are near the country and free air as the citizens of a city are to any park. The difference suffices for a classification. This does not touch the proposition why refunding is more essential to a small city than to a large one. There can be no good reason given for the difference. But many reasons can be urged why refunding should apply to all cities without distinction whatsoever. Knickerbocker *vs.* People, 102 Illinois, 218, decides that a law applicable to all counties of a class is neither a local nor a special law. In this case the legislature had established probate courts in counties with a population of 5,000 people only.

A case which fits the one at bar and answers completely the attempted distinction between refunding debts of large and small cities is Anderson *vs.* City of Trenton, 42 N. J. Reports, p. 486, where it was held that a statute purporting to confer upon all cities having a population of not less than 25,000 inhabitants the power of issuing bonds to fund their floating debt is a special law and in violation of the constitutional amendment which forbids the passing of special

laws to regulate the internal affairs of towns. The opinion of the court was delivered by Dixon, J.: "An act concern-
"ing cities, approved March 12th, 1880 (Pamph. L., p. 258),
"declares that it shall be lawful for any city within this State
"having a population of not less than 25,000 inhabitants, and
"having a floating or unbonded debt which the available
"funds of such city are insufficient to pay, by and through its
"common council or other body having control of its finances
"to borrow money to the amount of such floating or un-
"bonded indebtedness and to issue bonds therefor.

"The common council of the city of Trenton, deeming it to
"be among the municipalities thus designated, passed an ordi-
"nance for the issuance of bonds to fund its floating debt by
"virtue of these provisions, whereupon the prosecutor, a citi-
"zen and tax-payer in Trenton, sued out a writ of certiorari
"to test the legality of the corporate proceedings.

"The contention of the prosecutor (*inter alia*) is that this
"statute is special and local, and contravenes the constitu-
"tional amendment found in paragraph 11, section 7, article
"IV, which forbids the passage of private, special, or local
"laws to regulate the internal affairs of towns.

"Under this clause of the constitution it has already been
"decided in this State that a law to be neither special nor
"local need not apply to all towns—that it will be general if
"it apply to a class of towns. Thus cities have been held to
"be included among 'towns,' as here intended (Van Riper *vs.*
"Parsons, 11 Vroom, 1; Pell *vs.* Newark, 11 Vroom, 550), and
"so are townships said to be (11 Vroom, 555), and, doubtless, a
"law embracing all cities or all townships would be constitu-
"tional; for these bodies, because of their marked peculiari-
"ties, are, by common consent, regarded as distinct forms of
"municipal government, and so constituting classes by them-
"selves. But it has further been considered that these classes
"may also be subdivided by the legislature so that a law will
"be general which yet only touches a subdivision. As, how-
"ever this power of subdividing by legislation would, if unre-

"stricted, include the power to legislate for every individual "singly, since no two individuals are exactly alike, the con- "stitutional prohibition required that some limit, excluding "special and local legislation, should be placed upon its ex- "ercise. Hitherto this limit has been declared to exist in "the principle that the class to be affected must consist of "individuals distinguished by some important characteristic "to which the purpose of the law relates, and must embrace "all those so characterized. Thus, a statute giving to all "cities bordering upon tide water the power to construct "docks or establish quarantine regulations, or providing that "in all towns having volunteer fire departments the mem- "bers of the department should choose a commission to gov- "ern them, would, I presume, be valid. These groups would, "according to the principle laid down, be naturally classified "for legislation touching their peculiar qualities, and such "legislation, though affecting them alone, would be general. "But any attempt to legislate for a group of cities not classi- "fied in harmony with this principle is, as I understand, "declared to be evasive and in violation of the fundamental "law.

"The question to be determined concerning the law now "under review, therefore, is whether, since it does not relate "to all cities, it affects a class of cities constituted upon "this principle—whether the basis of classification is some "peculiar feature to which the provisions of the law are "naturally related.

"The basis of classification is a minimum of popula- "tion. The powers to be conferred by the statute concern "the issue of bonds for the purpose of funding floating "debts. Now, I am unable to see any natural connection "between the number of people in a city and its right "to refund its floating debt. It is true that there may be "some propriety in denying this authority to very small "municipalities and granting it to larger ones, but the same "may be said of almost every power usually possessed by

"cities. And it is manifest that if the classification made by "a statute is to be justified or not by considering whether it "is proper to apply the peculiar provisions of the law "to the particular individual or individuals designed to "be affected, then laws will be upheld or overthrown, not "as the courts shall decide them to be general or special, "but as they shall deem them wise or unwise. No rule "heretofore laid down in this State sanctions such a test "of constitutionality, nor do I think that such a criterion "should be adopted.

"In Pennsylvania, under a constitutional provision simi- "lar to ours, a statute has been adjudged valid which "divided the cities of the State into three classes—the first, "of cities containing over three hundred thousand inhabit- "ants; the second, of those containing from one hundred "thousand to three hundred thousand, and the third, of "those containing from ten thousand to one hundred thou- "sand (Wheeler *vs.* Philadelphia, 77 Penn. St., 338; Kil- "gore *vs.* Magee, 85 *id.*, 401).

"But that statute is distinguishable from the one now "before us, inasmuch as that classification was made for the "purposes of municipal legislation, and could, therefore, be "regarded as a general classification, while in the present law "the grouping of cities is for a special purpose only—to confer "on some a power of funding debts not granted to others; and "hence, in this respect, the law is special. If it be sustained "the classes into which towns may be divided on this simple "basis of population will be as numerous and diversified as "the purposes of the legislature, and all the evils sought to "be averted by the abolition of the power to legislate for "individuals will return under the form of class legislation. "I see no view in which this law will appear to be general."

On the same proposition of special legislation, in Classen *vs.* Trenton, 48 N. J. L. R., 438, it was held that "an act to "establish a license and excise department in certain cities "containing more than 15,000 inhabitants, and in which "the granting of licenses is not already vested in a board of

"excise, as in the court of common pleas, is local and special, "and, therefore, unconstitutional." The court said: "This "legislation is, in my judgment, clearly special. There can "be no reason suggested why cities with more than 15,000 "inhabitants should have a system of granting licenses "differing from that of cities with a less population. In re- "spect to the subject-matter of the legislation all cities are a "class, and an attempt to segregate cities into distinct classes "for this purpose by a standard of population is not classifi- "cation, but an arbitrary selection of one or more localities "for legislation" (p. 439). "Inasmuch as the granting of "licenses is a matter which appertains to all cities, any legis- "lation which deals with the method of granting licenses "must apply to all cities or reduce all cities to a uniform "system (p. 440)" (Tiger *vs.* Morris, Common Pleas, 13 Vroom, 631).

In Richards *vs.* Hosmer, New Jersey Law Rep., vol. 42, p. 439, an act regulating the internal affairs of two cities was declared unconstitutional because it only applied to them and could not apply to any other. It was there said: "But "a single argument has been presented in its support, which "is, that this act is general in its terms and embraces 'all of "a group of objects having characteristics sufficiently marked "and distinguished to make them a class by themselves.' "And these qualities, it is contended, bring this case within "the requirements of the constitution as the same is ex- "pounded in the case of Van Riper *vs.* Parsons, 11 Vroom, "125. But I do not understand that the decision thus in- "voked will bear the construction thus put upon it. It does "not undertake, as I understand it, to lay down any abstract "rule on this subject, but the expressions quoted are employed "in reference to the facts then under adjudication. Plainly "a law may be general in its provisions, and may apply to "the whole of a group of objects having characteristics suffi- "ciently marked and important to make them a class by "themselves, and yet such law may be in contravention of "this constitutional prohibition. Thus, a law enacting that

"in every city in the State in which there are ten churches "there should be three commissioners of the water de- "partment with certain prescribed duties, would present "a specimen of such a law, for it would sufficiently "designate a class of cities and would embrace the whole "of such class, and yet it does not seem to me that it "could be sustained by the courts. If it could be so sanc- "tioned, then the constitutional restriction would be of no "avail, as there are few objects that cannot be arbitrarily "associated if all that is requisite for the purpose of legis- "lation is to designate them by some quality, no matter "what that may be, which will so distinguish them as to "mark them as a distinct class. But the true principle re- "quires something more than a mere designation by such "characteristics as will serve to classify, for the character- "istics which thus serve as the basis of classification must "be of such a nature as to mark the objects so designated as "peculiarly requiring exclusive legislation. There must be "substantial distinction having a reference to the subject- "matter of the proposed legislation between the objects or "places embraced in such legislation and the objects or "places excluded. The marks of distinction on which the "classification is founded must be such, in the nature of "things, as will, in some reasonable degree, at least, account "for or justify the restriction of the legislation. Principles "of this sort can be best elucidated by examples. I have "already given a sample of a merely arbitrary classification "founded on no casual relation between the subject-matter "of such legislation and the things so classified. A sample "of the other, or legitimate kind, would be signified in a law "that should give to all cities in the State situated on tide "water the privilege of using such waters in connection "with their sewers. In such an enactment but a part of "the cities of the State would be embraced, but the classifi- "cation would be lawful and proper, inasmuch as the places "embraced would be possessed of a characteristic distinct "from those possessed by the excluded places, such charac-

"teristics being of such a nature as to afford a reasonable "ground for such special legislation. In the two classes of "instances thus exemplified the basis of the classification of "the one would be by a reference to marks of distinction "having no connection with the substance of the supposed "statute; in the other the opposite of this would obtain—so "that in the former the classification would be formal and "arbitrary; in the latter, substantial and springing out of "the nature of the subject of this legislation. The present "law is seemingly of the former kind. The class to which "it is made applicable is designated and selected by the "mark of each of its members, being possessed of a certain "kind of board of officers, a circumstance having no con- "nection but a formal one with the subject-matter of this "law, and in no way indicating a reasonable ground for "making these particular places the object of such special "legislation. In all but mere form, as I have said, these "places might as well have been designated by name as by "a reference to these organic bodies possessed by them, and "the effect of this law would have been precisely the same. "It seems to me difficult to find any stable ground for sus- "taining such an act, and, therefore, these writs should be "issued so that the question can be brought before the "courts in a formal manner."

The reasoning of Rauer *vs.* Williams, *supra*, is somewhat similar. To the same effect see:

Clarke *vs.* Cape May, 50 N. J. L., 558.
Atchison *vs.* Bartholow, 4 Kan., 124.
Hightstown *vs.* Glenn, 47 N. J. L., 105.
People *vs.* Cowper, 83 Ill., 585.
State *vs.* Philbrock, 15 At. Rep., 579.
Topeka *vs.* Gillett, 32 Kansas, 431.
State *vs.* Anderson, 44 Ohio St., 247.
State *vs.* Pugh, 43 Ohio St., 98.
State *vs.* Herrmann, 75 Mo., 340.
Scowden's Appeal, 96 Pa. St., 422.
Appeal of Ayars, 122 Pa. St., 266.

A General Refunding Act Now Exists.

As a complete answer to the claim that certain municipalities need a funding bill distinct in operation from others, and that there cannot be a general refunding act, it will suffice to say that a general refunding law is to be found in the statute book. On April 27, 1880, a law was passed adding five sections to the political code under the head of Funding and Refunding of City Indebtedness. These are known as section 4445, power of trustees or municipal council to fund indebtedness; issuance and form of bonds, section 4446; sale and exchange of bonds, section 4447; tax for payment of bonds; "bond fund," section 4448, redemption of bonds; section 4449, proceedings on failure to levy tax, county government act, section 25, sub. 14, Stat. 1893, p. 358.

Serious Objection to Act of 1893.

No method is pointed out whereby the old bonds can be exchanged for new interest-bearing bonds, as in the act of 1883. In fact, the act does not permit it. This clause of the act of 1883 is not re-enacted. Section 2 of the act of 1893 provides that whenever the treasurer has sufficient money in his hands he shall give notice of such fact by publication, and that he is prepared to pay the bonds, and if the same are not presented for redemption within 30 days after the first publication of such notice the interest on the bonds ceases. This is a clear case of violation of the agreement with the bondholder, and impairs the obligation of contracts, contrary to the Constitution of the United States and the Constitution of California.

See leading case of Louisiana *vs.* Pilsbury, 105 U. S., 278.

Sec. 10, art. I, sub. 1, Const. U. S.

Art. IV., sec. 1, Const. U. S.

Sec. 186, Simonton on Bonds.
Sec. 16, art. I, Cal. Const.
Meyer *vs.* Brown, 65 Cal., 583.
Davis *vs.* Yuba, 75 Cal., 452.
Bates *vs.* Porter, 74 Cal., 224.

This point is fatal to the act of 1893.

Mr. Justice De Haven, however, held that the act was not special. He said in deciding this case (89 Fed. Rep., 624):

"The constitution of the State of California recognizes the fact that it is wise to classify cities and towns with reference to population, so that legislation relating to their organization may be adapted to the interests or necessities of the different classes. Section 6 of article 11 of that constitution provides:

"'Corporations for municipal purposes shall not be created by *special laws*, but the legislature, by *general laws*, *shall provide* for the *incorporation*, organization, and classification, in proportion *to population*, of cities and towns, which laws may be altered, amended or repealed.'

"The word 'organization,' as here used, has reference to the powers which may be given to municipal corporations, and it is clear that by this section the legislature is authorized to provide different constitutions or charters for different classes of municipal corporations; that is, the legislature may, in its discretion, give to one class powers which are withheld from another. Now, the statute under consideration here confers upon municipal corporations other than those of the first class the power to issue negotiable bonds for the purpose of refunding their outstanding indebtedness. The statute deals with a subject proper to be considered by the legislature in the organization of cities and towns in the first instance, or in subsequent legislation relating thereto. Viewed in this light, it is apparent that the statute is not a special or local statute, within the meaning of the constitution prohibiting that character of legislation; and this conclusion is fully sustained by the cases above cited."

Answer to Mr. Justice De Haven.

The reasoning of Mr. Justice De Haven is best met and answered by the decision of Rauer *vs.* Williams, 118 Cal., 401, wherein it is said:

"The act under consideration, therefore, is not to be condemned merely because it applies to cities and cities and counties of the first class; for, as has been said, it may apply to but one class and still be a general law. But when a law is so made to apply to a class and not to all within the same general category, plain reasons must appear for the limitation. It by no means follows that a law is general because it operates upon all within a class. It is still special if it applies to all within a class *without reason appearing why it is not made to apply generally to all.* City of Pasadena *vs.* Stimson, 91 Cal., 238; Darcy *vs.* City of San Jose, 104 Cal., 642; *Ex parte* Jentzsch, 112 Cal., 468.

"All laws of a general nature shall have a uniform operation (Const., art. I, sec. 2), and the legislature is required by general and uniform laws to provide for the strict accountability of county officers for all fees which may be collected by them (Const., art. XI, sec. 5). This provision is not inconsistent with the provisions of the constitution applying to cities alone, and is, therefore, applicable to cities and counties (Const., art. XI, sec. 7; Kahn *vs.* Sutro, 114 Cal., 316).

"The manifest purpose of the act in question is to provide a scheme for the collection of fees which the legislature believes would be better and safer than the one in operation. Clearly the law is not designed for the convenience of the public, but for the protection and security of the municipality. But, this being so, there is no inherent reason, and no reason at all, why this attempted protection shall be accorded to a city of over 100,000 inhabitants and not to one of less population. It will not be said that there is danger of peculation and misappropriation of funds in the one case and no danger in the other. There is, therefore, nothing in the law itself—no inherent reason shown—why it should be made applicable to one class and not to all. In addition, it violates the express constitutional mandate requiring by general laws a strict accountability of officers for all fees; and, finally, it is a special law, passed in a case where a general law is applica-

ble. There is, then, no natural or intrinsic or constitutional distinction warranting the act in question, while there are express constitutional inhibitions against it."

The reasons given here are alike applicable to the case at bar.

To the same effect see—

Anderson *vs.* Trenton, 42 N. J. L. R., 486.
Richards *vs.* Hammer, 42 N. J. L. R., 439.

II.

THE SO-CALLED REFUNDING ACT OF MARCH 1, 1893, DID NOT GIVE GENERAL AUTHORITY TO ISSUE BONDS, BUT ONLY IMPLIED AUTHORITY (IF ANY) TO ISSUE THE SPECIAL BONDS, AND FOR THE PARTICULAR PURPOSE, SPECIFIED IN THE NOTICE OF ELECTION, A PUBLIC RECORD, OF WHICH ALL PURCHASERS HAD CONSTRUCTIVE NOTICE, AND WHICH ON ITS FACE DISCLOSED THE INVALIDITY OF THE BONDS.

Mr. Justice Ross in the case at bar succinctly states the law to be (98 Fed. Rep., 387–391):

"The Federal courts have always protected with a firm hand the rights of *bona fide* creditors of municipal corporations, uniformly holding that the bonds issued by such corporations under *granted* power, negotiable in form, are valid in the hands of a *bona fide* holder, notwithstanding irregularities in their issue, or even in the non-performance of prior conditions, *where the determination of the facts of such performance are by the law left to the determination of the municipal officers*, and they incorporate in the bonds which are

put upon the market proper recitals of such performance. The obvious reason for this is that where the law under which such securities are authorized to be issued commits to the *municipal representatives the determination of the conditions precedent*, and those representatives recite on the face of the bonds such performance, common honesty demands that the municipality be estopped to deny the truth of the recitals as against the *bona fide* purchaser of the bonds; *but it is equally well settled* that where the power to issue such bonds did not exist, or where the law under which they are issued requires *certain facts* to be made a matter of record open to the inspection of every one, there *can be no implication* that it was intended to leave such *facts to be determined* by the officers charged with the duty of issuing the bonds, and conclude by their recitals contrary to the facts so recorded (Sutliff *vs.* Commissioners, 147 U. S., 230; 13 Sup. Ct., 318, 37 L. ed., 145; Dixon Co. *vs.* Field, 111 U. S., 83; 4 Sup. Ct., 315, 28 L. ed., 360). It is, as a matter of course, not denied that every purchaser of a municipal bond is charged with notice of the law under and by virtue of which it is issued. In the present case that law is found in the statute of March 1, 1893 (St. 1893, p. 59), the first and second sections of which are as follows: * * *

"It will be noticed that there is in this act *no express* grant of power on the part of the municipal authorities to issue any bonds. There is an implied power, but the *implication* is not to issue bonds for *any and all purposes*, but refunding bonds with which to take up the outstanding bonds and warrants of the city, provided a majority of the qualified electors of the city should so vote upon the submission of the question to them in the mode described by the act. Whether the then outstanding indebtedness of the city should be refunded or not was not left to the *determination* of the municipal authorities, but they were by the statute empowered to submit that question to a vote of the qualified electors of the city, specifying in the notice of election the indebtedness to be refunded, together with all details of the proposed issue. The power thus conferred on the mayor and council could only be exercised at a meeting of the municipal board. Such bodies can only act by order, ordinance, or resolution, as every one is bound to know (Wesson *vs.* Saline Co., 20 C. C. A., 227; 73 Fed., 919; 15 Am. & Eng. Ency. Law, pp. 1028–1030, and cases there cited). In the

present instance the action of the mayor and council was by ordinance, as appears from the findings of the court below. Such ordinance was a part of the public records of the city, which by its charter are required to be kept 'in large, well-bound, uniform, and suitable books' (Stats. 1875–'76, p. 203). The indebtedness of the city thus evidenced by its outstanding bonds and warrants and proposed to be refunded by the issuance of other bonds the act of March 1, 1893, authorized the mayor and common council of the city to specify, together with the details of the proposed issue, and submit the question refunding the specified indebtedness upon the designated terms to the qualified electors for determination. In the event the majority of the votes should be in favor of the proposition, then the municipal authorities were *impliedly empowered to issue refunding bonds therefor, but for no other purpose.* The public record which the act of March 1, 1893, *taken and read, as it must be, in connection with the charter of the city*, required to be made by order, ordinance, or resolution disclosed to all the world the specific indebtedness that it was proposed by the municipal authorities to refund and in respect to which the qualified electors of the city were called upon to vote. The officers impliedly charged with the issue of such refunding bonds were *not in any manner* authorized to make any certificate or representation to prospective purchasers in respect to the character of the indebtedness evidenced by outstanding bonds or warrants of the city, in lieu of which the refunding bonds are authorized to be issued. On the contrary, the statute itself was clear notice to every person that upon the records of the governing body of the city was required to be entered the specific indebtedness proposed to be refunded, together with the details of the proposed issue of refunding bonds, and that it was only for such specified indebtedness that any refunding bonds could be issued. To that record every purchaser was referred by the very act under which alone the bonds in suit were issued. The notice of election directed by this act to be prescribed by the mayor and common council of the city occupies substantially the same position that the resolution did in the case of Lehman *vs.* City of San Diego, which was lately before this court and is reported in 27 C. C. A., 668; 83 Fed., 669. The present case is, we think, clearly within the doctrine of that case, and of Sutliffe *vs.* Commis-

sioners, *supra*, and Dixon Co. *vs.* Field, *supra*, and kindred cases, and must be ruled by them."

This clear and lucid statement of the circuit court of appeals should suffice to settle the points involved. The difficulty encountered by the bondholder is that he has not recognized the importance of the following:

A. *The limited power given by the statute of 1893.*

B. *The charter of Santa Cruz.*

C. *The decisions of the supreme court of the State of California.*

All the cases cited in the brief are based upon statutes which, first, do not resemble those of California; and, second, in which there was a general power given to the municipality to issue bonds. Before referring at length to the cases cited, attention must be called to—

A.

The Limited Power Given by the Statute of 1893.

As we have seen, it is a serious question whether this refunding act of 1893 is not unconstitutional. As a matter of prudence, a purchaser of bonds issued under its provisions should narrowly examine its provisions to ascertain, first, if the object of their issuance was lawful; and, second, if the words of the statute gave full power. A bare examination would suffice to show that no general power was conferred, and that no duty was imposed on the municipal authorities to pass upon the question of refunding without reference to the submission of the fact to the electors in accordance with the rules of law and the charter of the city and the statutes of the State. The common council could not proceed irregularly and make recitals that existed only in their imagina-

tions. In other words, there must be authority of law for the issuance of valid bonds. It was said in Dixon County *vs.* Field, 111 U. S., 83–92: "All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law when judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law." In other words, a violation of the statute means the same as an absence of statutory authority for the issuance of bonds. Now, an examination of the statute of 1893 shows that it applied, if at all, only to "an outstanding indebtedness evidenced by the bonds and warrants thereof." As was clearly said in this case by the circuit court of appeals: "The statute itself was clear notice to every person that upon the records of the governing body of the city was required to be entered the specific indebtedness to be refunded together with the details of the proposed issue of refunding bonds, and that it was only for such specified indebtedness that any refunding bonds could be issued. To that record every purchaser was referred by the very act under which alone the bonds in suit were issued." The refunding act made the notice of election jurisdictional. It was required to be given by the mayor and common council (Stats. 1893, p. 59). The mayor and common council could act only by ordinance (Wesson *vs.* Saline, 73 Fed., 919); the ordinances of the mayor and common council were public records, required to be kept "separately, in large, well-bound, uniform and suitable books" (Stats. 1875–'6, sec. 40, p. 203). As a fact, an ordinance was so adopted, recorded, and kept as a public record (Findings, 63 to 75), and said record showed that the bonds were issued for an unlawful purpose (Findings, 63 to 75, opinion of the court below, sub. 4), and that the election was invalid because the ordinance required the polls to be closed one hour and fifteen minutes before the time prescribed by law (Findings, 62–'3; Stats. 1875–'6, p. 191, sec. 5,

providing: "*The polls for all elections shall be opened at "nine o'clock a. m. and shall not be closed until sundown of the "same day*").

This brings the case at bar directly within the rule laid down in Lehman *vs.* San Diego, 83 Fed., 670; Dixon Co. *vs.* Field, 111 U. S., 93, and Sutliff *vs.* Board, 147 U. S., 230; and takes it out of the category of Chaffee *vs.* Potter, Hackett *vs.* Ottowa, and other cases cited on this point by defendant in error below.

There was no authority under the act of 1893 to include the payment of a private water company in the indebtedness of Santa Cruz. If a debt of this kind could be refunded in violation of a statute expressly forbidding it and in defiance of the rule of the constitution of California forbidding the payment of public money for private purposes, it will be readily seen that evil results will follow. Municipalities will be looted and plundered without power to protect themselves, and the game played at Santa Cruz will be attempted in other places and on a larger scale. It is a matter of grave concern to the American to observe the looseness with which the cities of the United States are governed and debts contracted in marked contrast to those of foreign nations. It would seem as if there was a tendency to assist the work of the despoiler instead of staying his hands. In the case at bar the evidence shows that, as Justice Gilbert truly remarks, "the city of Santa Cruz was by its agents defrauded of the proceeds of the refunding bonds, and never in fact received any portion thereof." One can see at a glance how easy it would have been, and was, for those who allege that they are innocent purchasers to obtain all the necessary information about the frauds committed. As it was, all of the bondholders had a knowledge of the ordinances.

They knew by the reports of their attorneys that the statute of 1893, by the very act of directing certain action to be taken by the mayor and common council, incorporated into the statute the charter of Santa Cruz, prescribing in de-

tail the mode and manner in which alone they could act, and consequently must be construed and read precisely and exactly as if it had said in so many words that the bonds could only be issued to refund an indebtedness of the city, *evidenced by bonds and outstanding warrants thereof specifically recited and described in an ordinance spread on the records and minutes and transcribed and kept open for public inspection in large, legible, and well-bound books, etc.*

In this case every feature of the legislation portrays the intention to interpose as a shield between the municipality and those dealing with its agents the public and definite record, *expressly required by law*, which contains on its face the imperishable and unmistakable evidence of the jurisdiction of the officials, their compliance with their only letter and warrant of authority or their disregard of its limitations and conditions.

For these reasons and because there was no thought or wish to confer a general power to issue bonds and then to superadd conditions *in pais* determinable finally by the officials and concluded by their recitals, as by the judgment of a court, the statute is mainly and in all substantials restricted and confined to and deals with matters not resting *in pais* and to be ascertained by perishable evidence in each given case, but with matters intrinsically and necessarily of record and ascertainable and determinable as well and as easily by intending dealers and purchasers as by the city officials.

There is no power given to refund the city indebtedness generally, but strictly and only that the evidence of which must appear and can only appear by the written and recorded action of the council. And then, carrying out the design, the notice of election is not, as usual, left *to the will, discretion, or caprice of the officials*, but must conform to the statute and distinctly specify the very writings and records evidencing the debt and the very bonds in every detail which, and which alone, can be issued and sold.

In this particular case the point is made still clearer, if

possible, by the course pursued. On one proposition the law is settled—that is, that no recitals can control or estop the municipality in regard to matters appearing on the face of the bonds. In the Sutliff case (147 U. S., 230) the statute required the officials in submitting the question to the voters to enter of record an order specifying the amount required, etc., and the court said that it was clear that the plaintiff, though a purchaser for value and before maturity, was charged with the duty of examining the record provided for in the statute in order to ascertain whether the bonds increased the indebtedness beyond the limit, and "that the "recitals in the bonds did not estop the county to prove by "the records * * * that the bonds have issued in vio- "lation" of the authority, etc., and that in such case there was no implication of authority in the officials to conclude the matter contrary to the facts so recorded.

Now, here, by a perfect parity of reasoning, the statute of 1893 required the officials in submitting the question to the voters, to enter of record a statement specifying the indebtedness to be refunded, etc., and equally all purchasers were bound to examine that record in order to ascertain whether the specified indebtedness was such as could be refunded, etc., and no recitals could estop or conclude in that regard. But there has never been any doubt as to whether a statement made or fact appearing on the face of the bonds, whether required to be made by statute or not, prevents a purchaser from relying on recitals to the contrary of that fact, if true. And so in the Sutliff case and other cases, some of which are there cited, it is held that when the amount of the bonds is stated on their face, that is sufficient to notify the purchaser. If, in this case, the notice of election had been copied into the bond in full, and so the bond had shown on its face its utter invalidity, it would not be, and is not contended there could be, any recovery. In such case, as, by necessary implication, is laid down in the Sutliff case, the purchaser is required to know the facts contained in the

records required by law to be made, and also whatever facts are stated on the face of the bond. And if, by putting both together, he can ascertain or must know *that the officials have exceeded their power*, he cannot recover. And in Chaffee *vs.* Potter, 142 U. S., 364, cited to the proposition, it is expressly said: "If the face of one of the bonds had disclosed that, as a "matter of fact, the recital in it, with respect to the constitu- "tional limitation, was false, of course the county would not "be bound by that recital, and would not be estopped from "pleading the invalidity of the bonds in this particular."

So, in McClure *vs.* Oxford, 94 U. S., 429–433, it is said: "These bonds, therefore, carried on their face unmistakable "evidence that the forms of law under which they purported "to have been issued had not been complied with. * * * "If a purchaser may be, as he sometimes is, protected by "false recitals in municipal bonds, the municipality ought "to have the benefit of those that are true."

The bonds in suit show on their face two things that are true: First. That they are issued for the purpose of refunding the *bonded* indebtedness of the city of Santa Cruz. Second. That they are issued in pursuance of and in conformity with *ordinances* of the city and of a notice of election given as required by the statute, and, therefore, reciting the indebtedness refunded.

Taking, then, the statute and the face of the bond together, as he must, the purchaser is charged with knowledge that it was only bonds and not warrants that were attempted to be refunded; that the election was called by *ordinance*, and that the ordinance recited and specified the particular bonds and was made a public record accessible to all, and kept in large, well-bound books; and also (though this is not essential here) that there were like public records by reference to which he could ascertain whether the bonds recited were outstanding.

B.

The Charter of Santa Cruz.

The act to reincorporate the city of Santa Cruz (approved March 11, 1876) provides, § 40:

"The city clerk must keep separately, in large, well-bound, uniform, and suitable books, an ordinance record in which shall be entered, in a good, round, legible hand, all the ordinances passed by the common council and approved by the mayor of the city of Santa Cruz, and said record shall be signed by the mayor and countersigned by the city clerk of said city" (p. 203).

If the statute of 1893 be read with the charter of Santa Cruz, we would have a statute somewhat similar to the following:

"The governing body of any city or town having an out-
"standing indebtedness, evidenced by bonds and warrants
"thereof, shall have power to pass an ordinance and enter
"the same in its ordinance record, which shall consist of
"large, well-bound, uniform and suitable books, kept at all
"times open for public inspection, calling, and prescribing
"the form of notice of, an election to determine the question
"of refunding such indebtedness. Such notice shall recite
"and describe the particular bonds or warrants to be re-
"funded, together with the denomination, character, time of
"payment, rate of interest, as well as all other details of the
"bonds proposed to be issued; and such recital and descrip-
"tion shall fix the denominations of the refunding bonds
"at not less than $100 and not more than $1,000, and the
"principal and interest as payable in coin or currency at
"the office of the treasurer or some designated bank, such
"interest not exceeding 6 per cent. per annum. If the re-
"quisite vote be in favor of refunding the indebtedness
"recited in said ordinance and notice, the bonds specified

"and described in said notice and ordinance shall be sold by "said governing body to the highest bidder for not less than "their face value."

In other words, the legislative authority under which these bonds were issued is just what it would have been under the statute supposed, and we have a case legally *identical* with Lehman *vs.* San Diego. The acutest and most subtle metaphysics cannot draw a distinction between a statute authorizing the officials of a town to issue or sell *the bonds* specified, recited, or described in an ordinance already passed and recorded and a statute giving them power to issue or sell *the bonds* described, recited, or specified in an ordinance thereafter to be passed and recorded and thereby authorized.

The unsubstantial and only distinction between Waite *vs.* Santa Cruz and Lehman *vs.* San Diego is that in the latter the governing body of the municipality, without previous authority, enacted an ordinance providing for the issuance of certain specified, described, and recited bonds in a specified mode and upon certain declared conditions, and the legislature afterwards ratified, confirmed, and made valid the ordinance, while in the former the legislature, in advance, enacted that the governing body should have power to enact a similar ordinance, and on its ratification by the electors might issue those specified, described, and recited bonds in the mode and upon the conditions set forth, recorded, and made certain in and by the terms of the ordinance, provided, however, that the ordinance should show on its face that the bonds to be issued were refunding bonds issued to take up previous indebtedness evidenced by bonds or warrants *of the city*.

It is obviously immaterial whether the legislature ratifies the ordinance, as in Lehman *vs.* San Diego, or authorizes it in advance, as in this case. The ratification is the equivalent, and cannot be more than the equivalent, of previous

authorization. The substantial points of resemblance, or, rather, of absolute legal identity, between the two cases cover the whole ground of debate. In neither was there given or conferred by the legislature any *general* power to issue bonds, coupled with conditions on the exercise of the power, the right to determine the existence of which conditions rested in *pais* or in parol and was committed to the decision of the governing body either expressly or by any implication.

The case of Lehman *vs.* San Diego, 83 Federal, 673, is but a corollary of Dixon County *vs.* Field. But why is this necessarily so? Because the principle established in Dixon County *vs.* Field, 111 U. S., 83, and Sutliff *vs.* Board, 147 U. S., 230, and kindred cases is that if the statute *expressly* requires the facts constituting the condition precedent to the authority to issue the bonds to be made a matter of public record, open to the inspection of every one, *there can be no implication* that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds.

C.

The Decisions of the Supreme Court of California.

It is the rule of the Federal courts to construe the statutes of a State according to the rule of settled construction in that State, provided the Constitution or laws of the United States are not in any manner contravened.

Claiborne *vs.* Brooks, 111 U. S., 400.

Under the statutes and laws of California, and by intendment and construction of law, a statutory requirement that a certain fact shall be embodied in a resolution or ordinance is an *express requirement* that it be made a matter of public record, open to the inspection of every one.

In Wesson *vs.* Saline, 73 Fed., 919, it is said: "Common "councils, boards of commissioners, and like municipal "bodies can act only by order, ordinance or resolution, as "every one is bound to know."

Consequently, when a statute, as in the Lehman case, refers to an ordinance or resolution it means, *ex vi termini*, something appearing on a public record; and, by a perfect parallelism, the statute in this case (of 1893), by its reference to the notice of election, enacts and provides for a public record.

In Lehman *vs.* San Diego, the statute did expressly require the facts to be made a public record, simply because, under the statute, the facts were required to be contained in the proceedings of the board. The ordinance ratified gave the board authority to issue the bonds when and to whom such board *might by resolution direct*. The court said (quoting from McCoy *vs.* Briant, 53 Cal., 247): "Under the terms of "the ordinance, no bond could be issued or delivered ex- "cept upon a resolution of the board, *appearing upon its "minutes or the record of its proceedings*, thus furnishing a "most important safeguard against fraud and an abuse of "power. Every person dealing in the bonds is bound, at "his peril, to inquire whether they were issued in the mode "prescribed."

Lehman *vs.* San Diego, 83 Fed., 673.

This decision simply followed the settled law of the State. That California doctrine is "that the issuance of bonds is "not within the scope of the general and ordinary powers, "* * * and such bonds can be legally issued only "by virtue of express authority of the legislature;" that if issued without any authority at all, they are wholly void, and that "*the character of one void act of public officers can- "not be changed by a second void act of the same officers declar- "ing the first act to be valid.* That even a statute *expressly* "conferring the power to refund on the board or other offi-

"cials, and not like that of 1893, giving no *express* power to "do anything but *make up a record* of the action of the "electors or some other body or tribunal and couched in the "same language, to wit, 'having an *outstanding indebtedness* "'*evidenced by bonds or warrants thereof*,' does not fall within "'the line of judicial decisions in cases where the validity "'of municipal bonds depended on the happening of some "'precedent contingency of fact, and the question was, "'whether the officers executing the bonds were vested with "'the discretion or power to determine if the contingency "'had happened. * * * But * * * the validity of "'the bonds * * * did not depend upon any fact—any "'matter *in pais*—there was nothing left to the discretion of "'the officers, etc.'"

Sutro *vs.* Pettit, 74 Cal., 332.

And that "every person dealing in the bonds is bound, at "his peril, to inquire whether they were issued in the mode "prescribed; and as the mode is the measure of the power, "the bonds would be void in the hands of a holder for "value, without actual notice, if issued in any other mode."

McCoy *vs.* Briant, 53 Cal., 247.

Construing the statute of 1893 in the light of this doctrine, as was done with the statute in the Lehman case, how can the conclusion be reached that it was the intention of the legislature to commit to the city officials the power to decide whether the bonds refunded and recited in the notice of election were "outstanding bonds of the city," or to conclude by any recitals the question whether the limited and implied power so grudgingly conferred had been followed or exceeded or the mode prescribed disregarded? By adopting the language of the statute construed in Sutro *vs.* Pettit, it is elementary law that the construction was adopted with the language, and every variation between

the statute construed in Sutro *vs.* Pettit and the statute of 1893 but reinforces that construction.

It has been said in the cases in the Supreme Court of the United States decided before Dixon County *vs.* Field established the correct, if not a new, rule (see opinion of Brewer, J., in Potter *vs.* County of Chaffee, 33 Fed., 615) that if it be the law that certain facts must appear, the question is to whom must they appear and when? Who is to decide, etc.? But under the statute of 1893 these questions are easily and must be differently answered. By the express mandate of the statute they must be decided when the notice of election is framed and must then be made to appear on the face of the record. If the officials were to finally decide and embody their decision in the recitals, there was no necessity for reciting the facts in the notice of election, and even in the first instance all they could decide was whether to take the decision of the electors on the question of refunding certain specified bonds and issuing other specified bonds. Then, as soon as the electors decided the question submitted, the record was made up and the decision a finality. There is absolutely nothing in the statute from which can be implied any power to alter, vary, or depart from this decision. The whole *express* power given by the statute had been exercised and exhausted. Nothing remained but the *implied* power to issue the exact and very bonds described in detail in the recorded decision and action of another and different tribunal—the electors—passing on a definite issue and question made up and presented to them. Unless this be so it would follow that the statute gave an implied power to vary at will the details, amount, etc., of the *new* bonds, and to ruin the city by issuing them for any amount they saw fit. For this, we presume, no one would contend, and it is to us inconceivable that upon any construction of this statute the legislative intent was to commit to the city officials the power of deciding contrary to the facts plainly apparent on the face of the recorded notice of

election what particular bonds were to be refunded, and, by the self-same language in the self-same statute, to deny them the power to decide in like contrariety what particular bonds could be issued for the very and only purpose of refunding the particular outstanding bonds specified.

We beg leave to repeat and emphasize the controlling facts and consideration peculiar to this case and distinguishing it from all those decided by the Supreme Court which are cited against plaintiff in error on this proposition that by the statute (1893, p. 59) the whole of the first section down to the words "said bonds shall be sold by such city "council, etc.," deals *with the making of the record which is to evidence the decision and determination of the electors.* From the rest of the section must be *implied* all the power conferred with reference to the issuing of bonds, and that *implication* is limited and restricted and confined to the sale and issuance of the very and identical bonds required by the preceding provisions to be described in minutest detail in the record already made up. The statute is express on this point. It says "said bonds" shall be sold, etc., and it must be construed as if it had said, "The bonds so described in "said notice may be issued, sold, etc." Can you imagine any legislator or proposer or framer of an act intended to confer the power to make an unlimited issue of bonds, and to decide *de novo* and finally, without reference to any previous action, determination, or record, whether the facts giving the authority to make such unlimited issue existed, phrasing and wording the statute as this is expressed? The legislature is presumed to have known the existing state of the law, especially the previous decisions in California. If such dangerous and unfettered power had been contemplated; if it was the design to reverse the whole policy of the State and change the whole spirit of her jurisprudence, would the very language already construed not to confer this power have been adopted? Would such pains have been taken to cast aside and omit the express grant of

power to issue bonds contained in the very statute they were amending? Would any proposal to amend this statute of 1893, when on its passage, by *expressing* the grant of power here sought to be fastened upon it by implication and construction, have been even listened to or entertained for a moment? Imagine a legislature gravely providing for a decision by the voters of the question of issuing certain bonds to be specifically described and spread upon the public records; then, after giving authority to certain officials to sell those specific bonds and no others, inserting in the same section of the same act a proviso, as follows:

"Providing the city officials shall have exclusive and "final jurisdiction and authority to determine and decide "what the public record already exacted and provided for "does recite and contain, and any recital in the bonds sold "by them shall be conclusive evidence of the contents of "said record and shall estop the city from showing that the "bonds issued and sold are not those described in said "record, no matter how great may be the excess of the issue."

Cases Cited by Petitioner are Not Applicable, Because a General Power was Conferred on the Municipality.

In Hackett *vs.* Ottowa, 99 U. S., 86, there was a *general* power and jurisdiction conferred. The power was expressly given to borrow money and to issue bonds therefor. The court said: "No limitation is prescribed as to the amount "which may be borrowed. Nor is any express restriction "imposed as to the objects or purposes for which bonds may "be issued." There was no provision in the statute requiring the ordinance or the notice of election to contain any statement or recital as to the *purposes* for which the bonds were to be issued, or in any other way providing for any record of the facts made in obedience to express requirement of the statute. There was, therefore, nothing in the statute

or on the face of the bonds or in the recitals directing purchasers to any record of the facts. They were not required to know that there was a record showing whether the bonds were issued in compliance with the statute. They were expressly assured that there was none showing any failure to comply. The court said the bonds would have been good *if they had made no reference to the ordinance*, etc. But in our case these bonds would have unquestionably been invalid, without a reference to or recital of the notice of election. At least, there must have been a recital of compliance with the statute, which could have been held *ex vi termini* to import and certify that there was a recorded notice of election setting forth all the essential and jurisdictional facts which we contend show the want of jurisdiction and flagrant departure from the statute in attempting to refund private debts. All the case decided was that the recitals could not be contradicted *as to the purpose for* which the bonds were issued, where there *was no requirement* that such purpose should appear on the face of the proceedings. If the statute in Hackett *vs.* Ottowa, instead of giving a *general power* and jurisdiction, had provided that an ordinance might be passed, specifying the *purpose*, etc., and then that the bonds specified in the ordinance might be sold, etc., the case would have been something like this, instead of being as it is, its very antithesis, and under such a statute it must have been differently decided or overruled by the subsequent line of cases like Dixon *vs.* Field and the Sutliff case.

Risley *vs.* Village of Howell, 64 Fed., 453; 57 Fed., 544, is subject to the same explanation. It follows and is professedly based upon Hackett *vs.* Ottowa, from which it is said not to be distinguishable. In both cases, all that is decided is that the mere circumstance that an ordinance sets forth facts showing an unlawful *purpose* when there was no statutory requirement that it should say anything on the subject does not when recited impose on the purchaser the duty of examining something the statute gave him no warn-

ing would afford him any material or reliable information. By the statute and recitals in Risley *vs.* Howell, the purchaser (*that court thought*) had a right to conclude that the bond had been properly issued and sold in strict accordance with law, and that with the purpose or act of the municipal officers in the subsequent disposition of the proceeds of the sale he had no concern. In other words, that he was not bound to see to the application of the purchase-money. The pertinent thing in this case of Risley *vs.* Howell is the reference to the Sutliff case, which shows how the case would have been decided had the Michigan statute resembled ours. The reference then would have read: "The case of Sutliff "*vs.* Lake Co., 149 U. S., 230, is a case of the same character "as the one before us. The bonds in suit were part of an "issue in excess and violation and utter disregard of the "power and jurisdiction prescribed by the statutes; and, as "the public records, to which the purchaser had access, dis-"closed the lack of power, he is bound by the facts disclosed "by them, notwithstanding the recital in the bonds that they "were issued in conformity with the statute."

The remaining case cited on this point in the opinion of the court below is Evansville *vs.* Dennett, 161 U. S., 434. Much that we have said applies to this case. In addition, we may say confidently that it was not intended to overrule or in any way or degree detract from Dixon *vs.* Field, the Sutliff and like cases. If there had been any such thought, those cases would certainly have been, at least, alluded to, especially as they have been so often before and since mentioned and treated as embodying the settled doctrines of the Supreme Court. Evansville *vs.* Dennett is one of a class of cases in which a town, city, or other municipality had power to issue bonds under a certain charter or statute, and also erroneously claimed and assert power to issue them under some other statute. In such cases it is held that the recitals that the bonds are issued under the statute which does not in fact give the power do not invalidate the bonds if there was

some other power, charter, or statute under which they might properly have been issued. Thus in Evansville *vs.* Dennett there was power under the charter to issue the bonds on a petition of voters or tax-payers presented to the council. There was also a statute allowing the bonds to be issued pursuant to a vote previously had. The statute, in fact, as it turned out, was not operative, as having been repealed or for some other reason. The council, however, passed a resolution declaring that the bonds were issued under the statute and upon a vote, and the ordinance or resolution did not purport to show, and did not show, that any petition had been presented, and in fact none was presented. The question presented to the Supreme Court was whether a recital in the bonds that they were issued pursuant to an ordinance affected purchasers with notice of the terms of the ordinance, and imposed upon them the duty of examining the ordinance. It was held that it did not, and that the purchasers had a right to act upon the supposition that the ordinance conformed to the charter, the only valid statute conferring power to issue the bonds, and that, therefore, the requisite petition had been presented.

Now, evidently, this is simply following Hackett *vs.* Ottowa. There was nothing in the statute, or in any of the statutes, requiring the petition to state the jurisdictional facts and making such statement a matter of record, public or otherwise. Whether the petition was presented and whether it was a proper petition was left a matter *in pais*, and there was no requirement that any ordinance or resolution should in any way refer to it, or make it a matter of record. The decision that the recital implied and assured the purchaser that the ordinance complied with the statute, in the very nature of the case, could only be a decision that the ordinance contained everything that the statute required it to contain. It certainly did not and could not decide that if the statute had expressly required that the ordinance should recite the petition, the recital would imply that it did not

recite it. It may be that the recital implied and even proved that the petition had been presented. That would be simply because, as there was no express statutory requirement on the subject, the matter of the presentation of the petition was left *in pais* and to the determination of the officials issuing the bonds. The ordinance could fully conform to the statute and to every requirement of law, and still be utterly silent as to the presentation of the petition. It was the Hackett case over again. Simply that the gratuitous and unnecessary statement of a fact in an ordinance did not make the recital of that ordinance notice to the purchaser of the fact. The case must stand just as it would have stood if the ordinance had in all respects complied with the statute, and had not, without any requirement of the statute compelling it, stated any matters showing non-compliance with the law. In the case we are discussing, for instance, the ordinance stated erroneously and mistakenly that the proceedings were held under an invalid statute, and did not state a compliance with the charter. But there was no statutory requirement that the ordinance should say anything about either. The case is the same as if a council having perfect authority to issue bonds under a valid statute should foolishly and mistakenly and unnecessarily pass an ordinance reciting the provisions of an invalid statute, and that they were proceeding under that, and then issue the bonds with proper recitals that they were issued in conformity to the law, and also in pursuance of ordinances. The general recital would control according to Evansville *vs.* Dennett.

The language of the court in Evansville *vs.* Dennett, 161 U. S., pp. 413–4, clearly shows that we have correctly interpreted that case, and plainly distinguishes it from ours, and such cases as Dixon *vs.* Field and the Sutliff case, which are not mentioned or referred to, as they certainly would have been had the statute of Indiana been anything like ours. This, we submit, is self-evident, unless some reasonable and

sensible distinction can be drawn between a statutory requirement of a public record accessible to *all*, and contained in legible, well-bound books, kept by the city itself, and any other public record like that of assessed valuation, registry of voters, etc., passed upon in the cases relied upon by petitioner. And even such a distinction would not reach the record in the Sutliff case. But there is no such distinction. *All the reasons* given apply equally to any "express and definite record of a public character." As appears from the language above referred to (161 U. S., 443-4), there were two statutes—one invalid, providing for an election; the other, the charter, valid, but requiring a condition *in pais*, nowhere required to be recited, or embodied in any record of any kind or nature—to wit, a petition of two-thirds of the resident freeholders. The court thought that the question whether there was a petition, whether it was signed by the requisite freeholders, etc., like other conditions *in pais*, was *intended by the legislature* to be left to the determination of the officials; that it was not necessary, or required by the statute, that such determination should appear of record or by ordinance or otherwise than by a recital in the bonds; that a mere recital of compliance with the charter concluded the question; and that though there was an unnecessary and superfluous recital of an ordinance, the purchaser had a right to assume, even if he had seen the ordinance, that the election under the invalid statutes was a harmless surplusage; and that, as recited, both methods were pursued, and both the valid and invalid statutes complied with. The ordinance did *not* show, as does the notice of election in the case at bar, *affirmatively*, a want of jurisdiction or abuse of power. It merely *failed* to show or make matter of record a fact which no statute required the ordinance even to allude to, and which the statute did not contemplate the entering of upon any record. According to the views of the court, the bonds would have been equally good, if the ordinance had been equally silent as to the petition

and the election, and the recital had simply been of compliance with the charter, omitting all reference to the invalid statute and the ordinance. This was merely following the Hackett case. The holding that the recital imported that the ordinance was in conformity with the statute is entirely consistent with the doctrine of Dixon County *vs.* Field, the Sutliff case and like cases. In those cases an express recital that the records in question existed and fully conformed to the statute requiring and providing for them would not have varied or influenced the result, except by furnishing an additional ground for the same decision. If the express recital in the case at bar of the notice of election imports its conformity with the statute prescribing its contents, it thereby imports that the record thereof absolutely furnished the exhaustive and conclusive proof of the power of the officials in regard to issuing the bonds, and the sole test of the regularity of its exercise. It does not present a case like Evansville *vs.* Dennett, where, notwithstanding the ordinance recited fails to show the power and jurisdiction affirmatively, there was still another source of power not alluded to in the ordinance under which the proceedings might have been regular, and which did not require the facts calling it into existence, and justifying the action taken, to be specially or otherwise recited and spread on the records. What would have been the answers to the questions in Evansville *vs.* Dennett, even under the Indiana statute and the Indiana decisions and jurisprudence relied on and followed, if the ordinance had shown affirmatively a lack of power and jurisdiction under both the statute and the charter, we need not consider further. We think nothing special need be said concerning the decisions, other than those relied upon by Judge De Haven, which have been cited by counsel; because, we submit, what we have already advanced applies to and covers them all. In so far as they agree with and follow the decisions of the Supreme Court, it certainly does; and if there be any inconsistent

therewith, which we think there are not, they are not authority here.

We may add, however, that in City of Huron *vs.* Second Ward, 86 Fed., 280, it is said: "The power granted by the "charter of the city of Huron is plenary. It was *general*, "*not special*. It was not limited to specified purposes, etc."

National Life Ins. Co. *vs.* Board, 62 Fed., 789, is fully in line with our contention, and well illustrates the differences between this case and all those cited against that contention.

The law always has some reference to common sense and the actual transaction of affairs. No man in his senses would or could in good faith invest in bonds under such a statute as ours without first investigating the notice of election, ordinance, etc. No lawyer would attempt to pass the bonds without calling for these documents. He would, after the first glance at the statute, see that the only power was to sell the particular bonds detailed in the record authorized by law. And, in fact, we find the very first thing called for and examined here was this very record.

III.

THERE WAS AN OVERISSUE OF BONDS, OF WHICH ALL PURCHASERS HAD NOTICE.

It is admitted by the pleadings that the assessment of the city of Santa Cruz for the year 1894 was $3,907,404. If the water-bond issue of $89,000 for a private corporation be excluded, the apparent bonded debt of the city is $630,000; or if the $89,000 water-bond issue be included, it will be $720,000. Under any feature of the case, the issuance of bonds should not be more than 15 per cent. of the assessment, to wit, $586,110. A purchaser of bonds buys with his eyes open, and is presumed to know that the statutes in force at the time become a part of the contract. It is the

policy of the State of California, expressed by the constitution, to keep its municipalities free from debt. It is, therefore, mandatory on investors to examine all laws which enter into the contract between its people and their creditors. The new constitution of 1879 gave ample notice of the fact that safeguards would be thrown around municipalities. In section 18, article XI, it provides that "No county, "city, town, township, board of education, or school district "shall incur any indebtedness or liability, in any manner, "or for any purpose, exceeding in any year the income and "revenue provided for it for such year, without the assent of "two-thirds of the qualified electors thereof, voting at an "election to be held for that purpose, nor unless before or at "the time of incurring such indebtedness, provision shall "be made for the collection of an annual tax sufficient to "pay the interest on such indebtedness as it falls due, and "also provision to constitute a sinking fund for the payment "of the principal thereof on or before maturity, which shall "not exceed 40 years from the time of contracting the same. "Any indebtedness or liability incurred contrary to this "provision shall be void."

In order, if possible, to make its provisions more far-reaching, the statute of 1891 was passed, limiting the contraction of debt to a certain percentage of the assessed value, as follows (Statutes 1891, p. 84, amending an act limiting the contraction of indebtedness, section 5): "No city, town, or mu- "nicipal corporation shall incur an indebtedness for public "improvements which shall in the aggregate exceed fifteen "(15) per cent. of the assessed value of all the taxable real "estate and personal property of such city, town, or munici- "pal corporation." Besides, the charter of Santa Cruz (Statutes 1875–'6, p. 193, in section 10 of said act) is very explicit on the proposition: "The common council shall not "create, audit, or allow, or permit to accrue, any debt or lia- "bility above the actual revenue or available means in the "treasury that may be lawfully apportioned and appropri-

"ated for such purpose; nor shall any warrant be drawn, or "evidence of indebtedness be issued, unless there shall be "sufficient money in the treasury legally applicable to meet "the same, except as hereinafter provided."

Caveat Emptor is the Rule in These Investments.

A person dealing with a municipal corporation must ascertain at his peril if it is exceeding the limitation of its indebtedness. He must determine for himself whether or not the proposed debt will cause the municipality to exceed the constitutional or statutory limitation. Thus, in Iowa the constitution, article XI, section 3, limited indebtedness as follows: "No municipal corporation shall be allowed to "become indebted in any manner, and for any purpose, to "an amount in the aggregate exceeding five per cent. on the "value of the taxable property within such corporation, to "be ascertained by the last State and county lists previous "to the incurring of such indebtedness."

In construing this provision, the supreme court of Iowa, in Scott *vs.* Davenport, 34 Iowa, 208–212, said: "The language "of the constitution is broad and sweeping. * * * It "includes all debts incurred in any manner or for any pur- "pose. It says, in effect, that whenever the corporate in- "debtedness, in the aggregate, shall amount to 5 per centum "on the taxable property within the corporation, no further "indebtedness shall be allowed to be created in any manner "or for any purpose."

Original Debt Incurred for Improvements.

There is another point to be considered. It is this: The original indebtedness was principally incurred for improvements, namely, water works for Santa Cruz. For that purpose, the sum of $300,000 was voted by the citizens of Santa Cruz. The point must be considered in view of the fact that

petitioner tries to draw a distinction between refunding and improvement bonds. Assuming the reason to be correct, the fact that the issue was a renewal and refunding issue, to take up improvement bonds, should have placed intending buyers on their guard. It renders the argument of counsel valueless. The correspondence between the Northern Counties Investment Company and Coffin & Stanton illustrates the point effectively. We quote from admissions, pages 100, 101:

"COFFIN & STANTON: Your letter of the 26th, proposing "to substitute city of Santa Cruz 5 per cent. bonds for city "of Santa Cruz water bonds, has been considered at our board "meeting this afternoon, when a disposition was evinced to "oblige you. Before giving a definite answer, however, we "should like some further explanation with respect to the "statement in the particulars you have sent, intimating that "the 5 per cent. bonds are issued to refund bonds for water "supply. Does this mean that the 5 per cent. bonds are in "substitution for the 6's we already hold, or does it indicate "that there are two sources of supply, one owned by the city "and the other by the Water Co.?"

In answer, Coffin & Stanton wrote: "We beg to acknowl- "edge the receipt of your favor of the 28th inst., and, in "reply thereto, would state that at the time the water works "were built in the city of Santa Cruz, the law authorized "the city to issue only about $300,000 bonds for this purpose. "As the works cost about $400,000 to build, it was necessary "to form a company which should issue its bonds for this "$100,000, retaining a lien upon the city's plant for their "security. It is these bonds which you now hold. Since the "time of the building of the works, the State laws of California "have been so changed that the municipality is now able "to refund the former municipal bonds (which were payable "one-twentieth each year for twenty years) into a new bond, "payable one-fortieth each year for forty years. And the "law has also been so changed that the city is now legally

"in a position to issue a sufficient number of bonds to pro-
"vide for the cancellation of the old Water Co. bonds, such
"as you now hold. There is but one source of supply, and
"the issue of municipal bonds which we now propose to give
"you in place of the Water Co. bonds will enable the retire-
"ment of the Water Company bonds, thus leaving the mu-
"nicipal bonds the only lien upon the property. We believe
"the securities offered to be in every respect as desirable as
"those now held by you, and trust you will see your way to
"give us a favorable reply to our request." The statement by Coffin & Stanton that there would be a retirement of the water bonds, thus leaving the municipal bonds the only liens, was false. The old issues were unpaid.

No Retirement of the Old Bonds Took Place, and Santa Cruz is Face to Face with a Debt of $660,000 *or* $720,000.

Such an overissue is invalid. In the refunding case of Doon County *vs.* Cummings, 142 U. S., 368, in which there was a similar state of facts, it was held that negotiable bonds, in excess of the constitutional limit, issued by a school district and sold by its treasurer for the purpose of applying the proceeds of the sale to the payment of the outstanding bonded indebtedness of the district, pursuant to the statute of Iowa, were void as against one who purchased them from the district with knowledge that the constitutional limit was thereby exceeded. There, the limitation of the constitution was 15 per cent. of the value of taxable property. There, too, refunding bonds were issued to take up old indebtedness. The court said, p. 372: "If new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding and on which the corporation is liable to be sued, is at once necessarily increased, and if new bonds equal in amount to the old ones are so issued at one time, it is doubled; and that it will remain at the increased amount until the proceeds of the new

bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged. It is true that, if the proceeds of the sale are used by the municipal officers, as directed by the statute, in paying off the old debt, the aggregate indebtedness will ultimately be reduced to the former limit, but it is none the less true that it has been increased in the interval; and that, unless those officers do their duty, the increase will be permanent. It would be incumbent alike with the words and with the object of the constitutional provision, framed to prevent municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit, depend solely upon the discretion or the honesty of their officers" (p. 372). In this case all refunding bonds in excess of the limitation were declared absolutely void. So held where an issue exceeded 10 per cent. of assessed value (Dixon County *vs.* Field, 111 U. S., 95). So held in a case from Colorado, where the recital stated that "all the provisions and requirements of said act had been "fully complied with by the proper officers in the issuing of "these bonds" (Lake Co. *vs.* Graham, 130 U. S., 674). So, too, in a case from Illinois, where the indebtedness of a city was increased by a new issue of bonds beyond the 5 per cent. limitation, although there were recitals (Buchanan *vs.* Litchfield, 102 U. S., 278). In Sutliff *vs.* Lake County Commissioners, 147 U. S., 230, the distinction was clearly drawn between the cases where the overissue was held valid, as in Marcy *vs.* Oswego, 92 U. S., 637; Humboldt Township *vs.* Long, 92 U. S., 642, and those where the overissue was held void. In the former (92 U. S.), certain commissioners were given the power to decide on the amount to be legally issued by the municipality. The records were not open to the world. In other words, these officers determined whether the facts existed which constituted the statutory or constitutional conditions precedent, and the law did not require the facts to be made a matter of public record. To quote (147

U. S., 235): "But if the statute expressly requires those facts "to be made a matter of public record, open to the inspection "of every one, there can be no implication that it was in- "tended to leave that matter to be determined and concluded "contrary to the facts so recorded by the officers charged with "the duty of issuing the bonds." The overissue was, therefore, held invalid. All these cases reiterate the rule that he who contracts with a municipality, whereby an indebtedness is created, must take notice, at his peril, of its financial standing and condition, and examine if the proposed indebtedness is in excess of the limit allowed by law (Doon County *vs.* Cummings, *supra*). Any other rule leaves the tax-payer at the mercy of the municipality and the contractor, and would render the constitutional or statutory provisions null and void (15 Am. & Eng. Ency. Law, 1124).

But it is still urged that there is a distinction to be taken between improvement bonds and refunding bonds. It is urged that there is a limitation in the case of the former, but none in the case of the latter. In answer to this, it can be said: If there were no debts there would be no refunding. Refunding means that all debts at a high rate of interest will be paid on terms more satisfactory to the municipality, both as to time and rate of interest.

Refunding applies to all kinds of indebtedness. It includes improvement bonds as well as other evidences of debt. If it were otherwise the term would be a misnomer. It is well settled that the prohibition of indebtedness applies to all forms of debt over which the municipality has control, and includes both express and implied as well as floating and bonded indebtedness.

Litchfield *vs.* Ballou, 114 U. S., 190.
Simonton on Bonds, sec. 54.

Indebtedness is an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agree-

ment. It was obviously the intention of the legislature in submitting and the people in adopting the constitution to arbitrarily restrict the power of municipal corporations to contract debts to a limited per centum of their taxable property, and to require, when that limitation has been reached, that such corporations shall be prepared to pay for whatever value they may obtain, without the inconvenience of any further indebtedness for any purpose whatever.

Sackett *vs.* City of New Albany, 88 Ind., 473.
Simonton on Bonds, sec. 55.

In construing these constitutional and statutory provisions attention must be paid to their terms. Limitations imposed by the constitution on the power of municipal corporations to contract debts should be construed with reference to existing facts and with a view to the practical working of that instrument, and such a literal construction as would defeat the object to be attained should not be adopted.

Law *vs.* People, 87 Ill., 383.

Statutes Enter Into All Contracts.

It is argued that a constitutional prohibition has more force than a statutory one. This is possible. Yet both are the expressions of popular will and both enter into all contracts made after their adoption by the people directly or by their representatives. No case can be found which holds that statutory limitations are not binding where the statute, the assessed valuation, and the public record of the debt referred to in them disclosed the entire absence of power to issue bonds, of which facts all intending purchasers were bound to take notice. Thus, in Broadway Savings Inst. *vs.* Town of Pelham, 83 How., 102, it was held: "The "statute made it the duty of the town clerk to keep a record "of the certificates and the amount and time of their pay-

"ment. The record was open to inspection, and an exam-
"ination of it would have disclosed to the plaintiff the fact,
"not only that the particular certificates in controversy were
"unauthorized, but also that the power of the town officer
"had been exhausted by borrowing the actual amount of
"the unpaid taxes upon other genuine certificates. The
"plaintiff was held chargeable with notice of the provision
"of the statute, and its failure to make an examination of
"the record deprives it of the standing of an innocent holder
"of the securities."

Thompson *vs.* Town of Mamakating, 37 How., 410; 106 N. Y., 674.

In respect to the amount of the certificates no distinction can be drawn between the case at bar and that last cited. In that case it appears that the town was authorized by statute to issue bonds to the amount of $175,000. The bonds sued for were in excess of that amount, and had been issued by mistake. Although the plaintiff was an innocent purchaser for value, without notice of the defect, the right to recover was denied upon the ground that he was chargeable with notice of the limitation put by the statute upon the power of the town commissioners, and was bound to ascertain, at his peril, that all the conditions requisite to the execution of their power had been observed and performed.

Recitals Necessary to Cause Estoppel.

It is claimed, however, that the recitals estop the municipality from claiming an overissue. The answer is that the rule now followed in the State and Federal courts is this: If it can be ascertained that the issue was in excess of the constitutional or statutory limitation, the bonds will be declared invalid, notwithstanding any recitals, unless the recitals, in express terms, state that the issue is not in excess of the constitutional or statutory limitation, and the amount

of the issue of the bonds is not ascertainable from the bond itself. The cases will be briefly mentioned:

In Buchanan *vs.* Litchfield, 102 U. S., 278, a case from Illinois where the water works were to be constructed by sale of bonds under a statute and ordinance, the bonds did not state that the proposed indebtedness was within the legal limit. The bonds were held void.

In Dixon County *vs.* Field, 111 U. S., 83, a case from Nebraska, in which there was an overissue of bonds, it was held that there was the same defect, and the same ruling was followed. The above case established the doctrine that where the limitation is based upon some public record, as the assessment-rolls, and the amount of the debt which may be incurred is a certain per centum thereof, or a given rate of taxation based thereon, then any purchaser of bonds or other paper is chargeable with notice of the amount of debt that can legally be incurred, and when that debt is evidenced by municipal paper, which on its face disclosed the total amount of paper issued, the purchaser must consult the assessment-roll, and from that he must ascertain, at his peril, after examining the constitutional limitation (as every purchaser is bound to know all the laws under which municipal paper is uttered), whether or not the total issue of paper exceeds the constitutional limit.

This case was followed by:

Quaker City Nat. Bank *vs.* Nolan Co., 59 Fed. Rep., 660.

Sutcliffe *vs.* Board, 147 U. S., 230.

Francis *vs.* Howard Co., 54 Fed. Rep., 487.

Lake Co. *vs.* Rollins, 130 U. S., 662.

Lake Co. *vs.* Graham, 130 U. S., 674.

Nesbit *vs.* Riverside Ind. Dist., 144 U. S., 610.

Hedges *vs.* Dixon County, 150 U. S., 182.

Records the Best Evidence in Bond Issues.

The supreme court of Texas, in Citizens' Bank *vs.* City of Terrill, 78 Tex., 456, thus refers to the effect of recitals on overissued bonds: "Where the authority to create the debt "at all, or beyond a gross amount, is made to depend upon "evidence furnished by official records, the same rule in "regard to recitals contained in bonds given for the debt "should not be applied. Every holder of such bonds is "charged with a knowledge of the provisions of the law "relating to their issuance, and if the law points to the "record as evidence of the existence of the facts required to "authorize their issuance, or to limit the amount of the "debt the city may create, such records, and not the "recitals in the bonds, must be looked to by every one "who proposes to deal in the bonds." See also Quaker City Nat. Bank *vs.* Nolan Co., 59 Fed. Rep., 660.

In Millsaps *vs.* City of Terrill, 8 Circuit Court of Appeals Reports, 557 (decided February, 1894), a water-works case, where a city had issued bonds to such an extent that the interest and sinking fund absorbed the whole of such tax, and then issued another series, and provided that the interest and sinking fund should be appropriated out of the general revenue of the city, the court, after holding that the first issue of bonds to the full amount authorized by the constitution exhausted its power to contract debts, and the additional issue was void without regard to its authority to apply its general revenue to the payment of interest and sinking fund of a bonded debt, said: "When we "consider, in addition, the well-settled proposition, that no "municipality can create a debt unless the power to do so is "either expressly or impliedly conferred upon it by law, it "seems clear that, in the case at hand, the coupons sued on, "as well as the bonds to which they were accessories, having "been issued by the city of Terrill for permanent improve-

"ments, after the power to create debts for such purposes "was exhausted, were void for want of power in the munic- "ipality that issued them (p. 577)."

And it is further said: "If we were without authority on "the subject, we are inclined, on principle, to the opinion "that it is against public policy to permit the necessary ali- "mony (made up of revenue) of any city, however small "such city may be, to be bargained away beyond the year "for which it is assessed and is applicable."

Again, in Francis *vs.* Howard Co., 54 Fed. Rep., 487, it is said: "All the decisions of the Supreme Court of the United "States, from Dixon Co. *vs.* Field, 111 U. S., 83, to Sutliff *vs.* "Board, 147 U. S., 230, agree that the purchasers of bonds "issued by municipalities, under authority of laws which "limit the amount of bonds to be issued to a certain percent- "age of the assessment-roll, or to a given rate of taxation on "such rolls, are charged with notice of the amount of the "bonds which can be validly issued, based on such assess- "ment-rolls."

The result of a review of the authorities in reference to the creation of an estoppel as to overissue is: There must be in the bond a recital to the effect that the total amount of the issue does not exceed the limit prescribed by the laws or constitution of the State. This is the doctrine of the leading case of Chaffee *vs.* Potter, 142 U. S., 355. Here bonds issued in excess of the constitution of Colorado were held valid in the hands of a *bona fide* holder for value because they contained a recital that the issue was not in excess of constitutional limits.

Following the decision in the Chaffee case, it was held in National Life Insurance Co. *vs.* Board of Education, 10 Circuit Court of Appeals, 637 (July, 1894), that the following recital acted as an estoppel: "And it is hereby certified and "recited that all acts, conditions, and things required to be "done precedent to and in the issuing of said bonds, have "duly happened, and been performed in regular and due

"form as required by law, and that the total amount of this "issue of bonds, together with all other outstanding indebt- "edness of said board of education, does not exceed the stat- "utory or constitutional limitation."

There is no such declaration in the Santa Cruz bonds; hence, there is no estoppel, and the bonds must be held invalid on account of the overissue.

Rule in California.

In this State the doctrine that all overissued bonds are void is well settled. Where an act authorized a county to erect a court-house for a sum certain, and bonds for a greater amount were issued, negotiable in form, and sold to *bona fide* purchasers, the overissue was held void. Refunding bonds subsequently issued by the county in place of such overissue were also declared void.

Sutro *vs.* Petit, 74 Cal., 332.

Purchasers of municipal bonds are bound to know the power of municipal corporations and of their officers by whom the bonds were issued; and as the statute requires all county bonds to be recorded, and the fact of the overissue can be readily ascertained from the number of the bonds, any mistake of the purchaser of overissued bonds, as to the validity of the bonds, is a mistake of law from which he cannot be released. So held in Sutro *vs.* Rhodes, 92 Cal., 117.

In the same case it was held: "Where overissued bonds "are sold in good faith, without any express warranty of "their legal validity on the part of the vendor, there is no "implied warranty thereof, but the rule of caveat emptor "applies, and the purchaser cannot recover the purchase- "money paid." It was, as a result, held that the act of March 25, 1868, in relation to the funded indebtedness of Calaveras county having expressly limited the issuance of bonds for such indebtedness, all overissued bonds in excess of such

sum were illegal and void, and did not bind the county, though negotiable in form.

Sutro *vs.* Rhodes, *supra.*

The Effect of the Overissue in the Case at Bar.

It is well settled that bonds issued in excess, or partly in excess, are void in all hands. When the bonds are in excess, in whole or in part, of the constitutional limit, or without a vote, when required by the constitution, and the valid cannot be separated from the invalid, the Federal courts hold that no action for money had and received would lie against a municipal corporation. * * *

Simonton, Bonds, sec. 238.

Equity will not grant relief to the holder of such bonds.

Litchfield *vs.* Ballou (Water Works), 114 U. S., 190.

Hedges *vs.* Dixon Co., 150 U. S., 182.

If the municipal corporation did not have the authority to do the work and make the public improvement, or if the money was not obtained for a public object, which the municipality had authority to do, but the money was used for some purpose about the doing of which the municipality had no authority to act, then the holder cannot recover at all. The whole issue will be held invalid, if the transaction is one and indivisible.

Simonton on Bonds, sec. 237.

15 Am. & Eng. Ency. Law, p. 1137.

Millerstown *vs.* Frederick, 114 Pa. St., 435.

Hedges *vs.* Dixon Co., 150 U. S., 182.

Not even ratification will make good, bonds issued beyond the lawful limit.

Davies *vs.* Dickinson, 117 U. S., 657.

McPherson *vs.* Foster, 43 Ia., 48.

IV.

THE 150 BONDS HELD BY WALLACE & CO. WERE ACQUIRED AFTER A KNOWLEDGE OF THE ILLEGAL CHARACTER OF THE ISSUE.

The present suit brought by Waite for collection affects only nine of these Wallace bonds and some coupons, but the same evidence of notice applies to all. The testimony of S. Wallace, Walter Stanton, Turney, his clerk, and the letters of Prince & Co., show clearly that Prince & Co. were the agents of Wallace to sell certain belting stock; that Prince arranged to do so with Coffin & Stanton at 85 cents on the dollar, provided the Wallaces accepted 150 Santa Cruz refunding bonds at par for the balance due. This the Wallaces did, and paid Prince & Co. $2,500 for their services. The amount paid in cash by the Wallaces was $118,000. Prince & Co. advanced $100,000 and took the 150 Santa Cruz bonds as security. The fact that the Wallaces were parties to the transaction and now own the bonds is admitted, but it is contended that Prince & Co. were the agents of Coffin & Stanton and had no such relation to the Wallaces. It is conceded if Prince & Co. were their agents the knowledge of Prince & Co. was theirs, and notice to them was notice to the Wallaces. It is claimed, however, that the Wallaces were *bona fide* purchasers, who depended on the recitals in the bonds only, and did not ask for further information in reference to the validity of the bonds; that the act of Prince & Co. as agents in demanding full papers, full copies of the ordinances and resolutions of Santa Cruz in reference to the bond issue, did not bind them as principals. But the evidence of Sumner Wallace alone shows the contrary. The letters of Prince & Co. were also produced, and tell the true story. Not satisfied with

the opinion of Z. N. Goldsby, the city attorney of Santa Cruz, as to the validity of the bonds, and the further opinion of Lafayette Gleason, an attorney of New York, Mr. Wallace insisted that a Mr. Dickinson, attorney for the American Title and Trust Company, be retained. He demanded more papers. More papers were given. All the ordinances and orders of the Santa Cruz council were produced. He reported favorably. Prince & Co. furnished the opinion of their own private counsel, Story & Thorndike (Prince's test.). More than that, the Wallaces advised with Rollin & Co., dealers in bonds, as to the validity of this Santa Cruz issue before they were satisfied. This is made clear by the evidence of Mr. Sumner Wallace. He testified: "All these opinions were procured by Prince & Co., or by "Coffin & Stanton. The Goldsby and Gleason opinions were "submitted to us without consultation with us, but the Dick- "inson opinion was obtained after by agreement, after I had "said to Prince & Co. *that I wanted an opinion from Dickin-* "*son.*"

Agencies for Two Parties.

It is claimed that notice to an agent, in this case Prince & Co., is no notice to his principal where the agent's relations on the subject-matter render it probable that he will not disclose the facts to his principal. In the case at bar there was no evidence that Prince & Co. did not disclose all the facts of the Santa Cruz bonds shown by the certified copies of the papers and ordinances submitted to the various attorneys. On the contrary, there was no secret about the matter. In fact, Sumner Wallace insisted that his attorney, Mr. Dickinson, should examine the proceedings, and, further, the firm made inquiries of the firm of Rollin & Co. Moreover, in this State it is well settled that there can be no presumption that an agent of two parties will deal unlawfully with either, and it is only when the agent has personal interests

conflicting with those of his principal that the law requires peculiar safeguards against his acts.

Pauly *vs.* Pauly, 107 Cal., 8.

In the case at bar there was no reason for precaution. Assuming, for the sake of argument, that Prince & Co. were the agents of both parties, which we deny, as it appears they were only agents for Wallace, who paid them a commission of $2,500, it does not appear that they were acting fraudulently and adverse to the Wallace interest when a loan of $100,000 was made by them to the Wallaces, secured by these Santa Cruz bonds. This in itself is sufficient evidence that they were acting in good faith and believed the opinions of the attorneys were correct in reference to the defects in the entire issue of bonds. It is certainly the best kind of proof that they were acting fairly. Men do not loan $100,000 on what they believe is poor security.

During the trial Judge De Haven thought that notice was given to Wallace. Here is a transcript of the stenographer's notes.

On page 267, volume III, of the typewritten testimony we read:

Mr. MAGUIRE: We will call your honor's attention at the proper time to the evidence of Wallace that Prince was his agent in the transaction.

The COURT: He was either acting for himself or for some one else. If he was acting for himself he had notice of whatever was brought to his attention. If he was acting for some one else his principal had notice through him.

Yet the court held and found as a fact that notice to Prince & Co., the agents of the Wallaces, was not notice to them, because Prince & Co. are to receive a commission from Coffin & Stanton in the same transaction. In other words, compensation prevents the imputation of knowledge to either

principal; but the contrary doctrine is held in a California case.

Witter *vs.* McCarthy, 43 Pac. Rep., 969.

See also—

Surety Co. *vs.* Pauly, 170 U. S., 149–159.
Bradley *vs.* Riches, 9 Ch. Div., 189.

The cases cited by counsel for Waite in reference to the employment of attorneys do not meet the point, for the reason that in no case were the attorneys' services requested by the person to be charged with notice. In this case Dickinson's opinion was an imperative necessity, such as Judge Dillon's would be to his clients upon some point of municipal corporate law. Cases might be multiplied *ad nauseam*. To render the facts clear, a brief digest of the evidence will be given. First, the letter of Prince & Co. to Coffin & Stanton will explain the commencement of the trade:

F. H. Prince & Co., bankers and brokers, 2 and 8 State street.

BOSTON, *Sept.* 22, 1894.

Messrs. COFFIN & STANTON, *New York, N. Y.*

GENTLEMEN: We have arranged a trade for you with Messrs. E. & E. G. Wallace, as follows:

We have sold $150,000 City of Santa Cruz, Cal., bonds at par, you to deliver the bonds of the earliest date of maturity which you hold on Tuesday next and $150,000 City of Ironwood, Mich., 6 per cent. bonds at 105 and interest, you agreeing that the legality of the City of Ironwood bonds shall be satisfactory to Judge Dillon and a legal opinion obtained from him to that effect, and if not from him from such lawyer as may be agreeable to us. You are to take, in part payment of the above bonds, 520 shares of common and 350 shares of preferred stock of the Page Belting Co., at 85 per cent. of its par value, as follows: Half on the delivery of $150,000 City of Santa Cruz bonds and the other half on the delivery of the $150,000 City of Ironwood bonds, you to

deposit with us $10,000 City of Waco, Tex., first-mortgage Water Co. 6 per cent. bonds and the 435 shares of Page Belting Co. stock received by you on delivery of the $150,000 City of Santa Cruz bonds as surety that you will perform in full the above agreement in delivering the $150,000 of City of Ironwood bonds on the condition above named and receive the remaining one-half of the Page Belting Co. stock—that is, 435 shares—as part payment thereof. The balance of purchase-money for each lot of bonds is to be paid in cash on the delivery of bonds.

Please confirm the trade by signing the enclosed letter and returning same to us forthwith.

Very truly yours, F. H. PRINCE & Co.

Frederick Prince, of Prince & Co., testified that he loaned Wallace & Co. $100,000 to pay for the Santa Cruz bonds. He held these bonds as security for the loan. "Coffin & Stanton sent us all the papers relating to the use of the Santa Cruz refunding bonds and we submitted them to Mr. Dickinson. Coffin & Stanton always sent a very full set of papers—votes, and so forth. It is customary in selling bonds in Boston to give a Boston lawyer's opinion in reference to the same. The opinions of the California lawyer and the New York lawyer were sent to him with the papers of Coffin & Stanton. I think Dickinson gave us his opinion. * * * After we originally got the papers from Coffin & Stanton Dickinson asked for certain papers which we sent for to Coffin & Stanton, and they sent them to us. That was *subsequent* to the *first papers* sent and before *Dickinson gave his opinion.*"

Walter Stanton testified that papers were sent, and Mr. Prince stated that they had been placed in the hands of attorneys Story and Thorndyke. The full record of the Santa Cruz proceedings was sent to Prince & Co.

Turney, the chief clerk in Stanton's office, testified that the papers were selected by Mr. Stanton and himself, and either forwarded by him or under his supervision to Prince & Co. He recognized the papers contained in the package

marked "Santa Cruz refunding bonds," "Full transcript of proceedings." "Notice of special election" was included; so, too, ordinances 315, 317, 318, 320, &c., &c.; notice of special election; also statement of population and valuation of the city of Santa Cruz, &c.

Sumner Wallace testified that he was one of the firm of Wallace & Co., the buyers of the Santa Cruz bonds. Prince & Co. submitted the opinions of Goldsby, of Santa Cruz, and Gleason, of New York.

"*This was not satisfactory to us, and we asked for the opinion of some attorney in Boston, and decided to refer it to Mr. M. F. Dickinson, of the American Loan and Trust Company, and the opinion was obtained that I have here. The opinion being favorable, I purchased the bonds.*" Made an inquiry as to the value of these bonds as a financial proposition from E. H. Rollins & Sons, bankers and bond dealers, Boston. On cross-examination, he said: "My uncle made no investigation. He left it all to me. I wrote the first proposition to Mr. Prince, and had a talk with him some time in August. * * *

"The Goldsby and Gleason opinions were submitted to us without consultation, but the *Dickinson opinion was obtained after by agreement, after I had said to Prince & Co. that I wanted an opinion from Dickinson.*"

In reference to the point that there is no clear presumption that the agent would not communicate, see—

1 Encyclopædia, E. & A., p. 1145.

Loring *vs.* Broder, 134 Mass., 458.

In re Pilkington Bank, 58 N. W., 784.

Kind of Notice Immaterial.

Our position is this: If Wallace & Co. or any purchaser received any information of a defect in the bonds, that is sufficient of itself to put him on inquiry as a prudent man.

No matter how this information is acquired, by agents or otherwise, it is fatal to the claim of being an innocent purchaser.

The law concerning notice of defects to the bondholder is well stated in Burroughs, Public Securities, thus (page 360): "The holder of municipal bonds who is protected from "defects in their issue is one who has no knowledge of the "defects, for, if he knows of these defects, he is placed upon "precisely the same footing as the original parties to the "transaction. Any defense that would be good between the "maker of the paper and the payee would be good as to a subsequent holder who has notice of the equities or defects set "up as a defense to the bonds.

"We have heretofore considered the question of how far "the recitals in the bonds themselves were notice to the purchaser of defects, and the doctrine then announced was "that they were not only notice of defects appearing on the "face of them, but when they put a party upon inquiry he "was deemed to have all information that, by reasonable "diligence in the prosecution of that inquiry, he could "obtain.

"Notice is not confined to recitals of the bonds. It is immaterial how the purchaser gets the information that there "are defects in the issue of the bonds; it is the fact that he "has knowledge of the defects that binds him and puts him "in the same position as the original payee of the bond, who "is bound to see that all the conditions of issue have been "fully complied with.

"In City of Lexington *vs.* Butler, 14 Wall., 282, the plea, "which was a good one, set out the facts, which showed that "the bonds had been improperly and fraudulently put in "circulation, and then averred that the plaintiff had notice "of these facts. This plea, if sustained by proof, would "have defeated the holder. * * * In Cass County *vs.* "Green, 66 Mo., 498, where holder was affected with notice

"of fraud in issue of bonds; negotiation enjoined and bonds "directed to be delivered up to be cancelled."

See—

Hopple *vs.* Hipple, 33 Ohio St., 116.
Harshman *vs.* Bates Co., 92 U. S., 569–575.
Bates *vs.* Winters, 97 U. S., 85–91.
McClure *vs.* Township Oxford, 94 U. S., 429.

In the last-named case the purchaser was presumed to know that the notice of thirty days before election had not been given. The recital informed him of the day of the election and directed him to the law under which the bonds were issued, which in express terms announced to him that it did not take effect until published in a particular newspaper; and being thus put upon inquiry, it was his duty to ascertain when the law was published and did go into effect, and he will be chargeable with such information as by reasonable diligence he could have ascertained. Chief Justice Waite remarked:

"To be a *bona fide* holder, one must be himself a purchaser "for value without notice, or the successor of one who was. "Every man is chargeable with notice of that which the law "requires him to know, and of that which, after being put "upon inquiry, he might have ascertained by the exercise "of reasonable diligence. Every dealer in municipal bonds, "which upon their face refer to the statute under which "they were issued, is bound to take notice of the statute and "of all its requirements."

McClure *vs.* Township Oxford, 94 U. S., 429.
Burroughs, Public Securities, p. 331.

V.

THE HOLDERS OF 101 ADDITIONAL BONDS HAD DUE NOTICE OF THE DEFECTIVE ISSUE BY REASON OF THE CIRCULARS ISSUED BY COFFIN & STANTON, WHICH CLEARLY SHOWED AN OVERISSUE, AND BY REASON OF THE OPINIONS OF ATTORNEYS AND OTHER SOURCES OF INFORMATION.

(Reference will be made to the typewritten testimony.)

In addition to the 150 refunding bonds bought by E. & G. Wallace with notice, there are at least 101 bonds where the purchasers did not rely upon the recitals of the bonds, but had evidence before them of the illegal issue. The International Trust Company of Boston holds 16 of the refunding bonds. These were held as collateral for a loan of $4,000. The $4,000 was first secured by Illinois Central bonds. The examination and approval of Coffin & Stanton's attorneys satisfied them (p. 6, stipulation). The Kenduskeng National Bank of Bangor, Maine, on May 31, 1894, loaned $10,000 to Coffin & Stanton on 12 refunding bonds. The cashier telegraphed to A. P. Swanton, of Santa Cruz, to know if the bonds were good (p. 46). The bank had received knowledge of the overissue by circular of Coffin & Stanton (p. 50). Martin's Bank, Limited, of London, holds 10 bonds. The bank had knowledge of the refunding to benefit a private corporation (*ibid.*, pp. 63–9). The South Norfolk Savings Bank of South Norfolk loaned Coffin & Stanton $10,000 on 11 bonds of Santa Cruz June 26, 1894. The officers of the bank saw the attorney's opinion, also the circular with the account of overissue (p. 371). Coffin told the officers that he absolutely bought the bonds (p. 38). The First National

Bank of Worcester, Massachusetts, on July 20, 1894, loaned $25,000 to Coffin & Stanton, partly on Illinois Central and Santa Cruz bonds; $22,000 was loaned on 22 of these bonds. Petitioner herein bought the bonds for 60 per cent. of their face value. The bank received notice of overissue by a circular, and also of the invalidity of the bonds through a Mr. Terrell. Petitioner bought other bonds at 40 per cent. of their face. Coffin & Stanton stated that they were the fiscal agents of Santa Cruz (p. 26). The First National Bank of Webster, Massachusetts, has 4 refunding bonds. It had notice of overissue by circular (*ibid.*, 55–60). The Bank of Skaneateles, New York, loaned Coffin & Stanton $10,000 on 7 bonds June 1, 1894; had notice of the overissue by the circular, and also wrote to a banker in Santa Cruz and received a pamphlet in reply (p. 42). The Chapman National Bank of Portland, Maine, May 8, 1894, loaned Coffin & Stanton $5,000 on the security of 7 Santa Cruz bonds. It believed that Coffin & Stanton were the absolute owners. It wrote to several parties in Santa Cruz about the bonds (p. 9); also saw the opinion of Coffin & Stanton's attorneys, loaned on the security of City of Ironwood, Michigan, bonds and American Debenture Company, Chicago, as well as Santa Cruz bonds. The City of Ironwood bonds were declared invalid. The Debenture Company of Chicago turned out valueless. The Wakefield Trust Company of Wakefield, Rhode Island, on August 2, 1894, loaned Coffin & Stanton money on one Santa Cruz bond. It arranged with the receiver of Coffin & Stanton to take the bond at 60 per cent. of its face value. It received circular with the account of the overissue (p. 12). The First National Bank of Hagerstown, Maryland, holds 6 of the bonds on note of Coffin & Stanton dated July 18, 1894. It received circular in reference to overissue (p. 28). It looked up the question of population (p. 30). The Albany City National Bank of Albany, New York, holds 11 bonds. It made a loan to Coffin & Stanton on July 25, 1894, on 11 Santa Cruz refunding bonds. The bonds were sold after the

failure of Coffin & Stanton and brought 60 cents on the dollar. It had knowledge of overissue by circular. Farmers' national bank, Mount Holly, New Jersey, on June 2, 1894, loaned Coffin & Stanton, on 4 bonds of Santa Cruz as collateral. Receiver Coffin & Stanton stated that court had authorized them to value bonds at 60. Had circular (p. 44). National Bank of Waterville, N. Y., May 3, 1894, loaned on 1 Santa Cruz bond. It made a thorough investigation of the bonds. It wrote Mayor Bowman, of Santa Cruz. Coffin & Stanton said they had bought the bonds. The bond was sold at public sale and bank bought same. Coffin & Stanton sent prospectus of bonds of Santa Cruz, viz: Circular. (See letter of Bowman, p. 55.)

Northern Counties Investment Trust (Limited) loaned Coffin & Stanton on 3 bonds. It had full knowledge of the fact that the refunding bonds were issued to take up the indebtedness of the Santa Cruz Water Company. This the plaintiff concedes and admits that as to those bonds the notice is clear. The claim of the assignee falls. What is true of these is, in truth, true of all.

Burden of Proof.

Burden of proof shifts when defendant has shown, as he has here, circumstances of fraud or illegality in the inception of the bonds or in the circumstances under which they were issued. Then plaintiff cannot recover without proof that he purchased them for value, or gave some consideration for them.

Stewart *vs.* Lansing, 104 U. S., 509.
Vosburg *vs.* Diefendorf, 119 N. Y., 357.
Smith *vs.* Livingston, 111 Mass., 342.
Jordon *vs.* Grover, 99 Cal., 194.

The defendant has clearly shown fraud and illegality in the issue of bonds, and that notice of the facts was acquirep

by the bondholders by the public records, ordinances, and statutes. Hence they are not *bona fide* purchasers and are not protected by recitals. The assignors of plaintiff have failed to reply to the evidence of defendant on these propositions.

Defendant has shown that the consideration is illegal, that the bonds were fraudulently delivered, and that the conditions precedent were not performed, and that the bonds were stolen before plaintiff's assignors received them.

Sect. 120, Simonton on Bonds.

In conclusion, we submit that this case is one of peculiar hardship for the citizens of Santa Cruz. The views of Mr. Justice Miller, in a similar matter, can be quoted here with effect:

"In *County Bond Cases*, * * * it is held that the "paper, though issued without authority of law, and in op- "position to its express provisions, is still valid.

"There is no reason in the nature of the condition on which "the power depends in these cases why any purchaser should "not take notice of its existence before he buys. The bonds "in this case were issued at one time, as one act, of one "date, and in payment of one subscription. All this "was a matter of record in the town where it was done.

"So, also, the valuation of all the property of the town for "the taxation of the year before the bonds were issued is of "record both in that town and in the office of the clerk of "the county in which the town is located. A purchaser had "but to write to the township clerk or the county clerk to "know precisely the amount of the issue of bonds and the "value of the taxable property within the township. In the "matter of a power depending on these facts, in any other "class of cases, it would be held that before buying these "bonds the purchaser must look to those matters on which "their validity depended. They are all public, all open, all

"accessible—the statutes, the ordinance for their issue, the "latest assessment-roll. But in favor of a purchaser of mu- "nicipal bonds all this is to be disregarded, and a debt con- "tracted without authority, and in violation of express stat- "ute, is to be collected out of the property of the helpless "man who owns any in that district. I say helpless ad- "visedly, because these are not his agents. They are the "officers of the law, appointed or elected without his consent, "acting contrary, perhaps, to his wishes. Surely if the acts "of any class of officers should be valid only when done in "conformity to law, it is those who manage the affairs of "towns, counties, and villages in creating debts which not "they, but the property-owners, must pay. * * *

"It is easy to say, and looks plausible when said, that if "municipal corporations put bonds on the market they "must pay them when they become due. But it is another "thing to say that when an officer, created by the law, ex- "ceeds the authority conferred upon him, and in open "violation of law issues these bonds, the owner of property "lying within the corporation must pay them, though he "had no part whatever in their issue and no power to pre- "vent it.

"This latter is the true view of the matter. As the "corporation could only exercise such power as the law con- "ferred, the issuing of the bonds was not the act of the cor- "poration. It is a false assumption to say that the corpora- "tion put them on the market. If one of two innocent "persons must suffer for the unauthorized act of the town- "ship or county officers, it is clear that he who could, before "parting with his money, have easily ascertained that they "were unauthorized, should lose, rather than the property- "holder, who might not know anything of the matter, or, "if he did, had no power to prevent the wrong" (Humboldt Township *vs.* Long *et al.*, 92 U. S., 649).

FRANK J. SULLIVAN,
Amicus Curiæ.